USE OF CLASSIFIED INFORMATION IN FEDERAL CRIMINAL CASES

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

H.R. 4736

USE OF CLASSIFIED INFORMATION IN FEDERAL CRIMINAL CASES

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USE OF CLASSIFIED INFORMATION IN FEDERAL CRIMINAL CASES

THURSDAY, APRIL 24, 1980

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:43 a.m., in room 2237 of the Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Edwards, Drinan, Volkmer, and Hyde.

Staff present: Catherine LeRoy, counsel, and Thomas M. Boyd, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

In recent years we have seen a number of highly publicized criminal trials in which the use of classified information became a major issue. These include espionage trials of individuals accused of selling or transmitting national security secrets to our enemies, as well as prosecutions of high Government officials for official wrongdoing.

In the course of these prosecutions, the defense may seek to introduce highly sensitive classified information as part of its case. Depending on the nature of the information and the extent to which it has already been compromised, the Government may be confronted with the dilemma of disclosing the sensitive information or dismissing the prosecution.

This phenomenon has come to be called "graymail". This is perhaps a misnomer, because it implies something improper, verging on the illegal, when, in fact, it may be that a defendant is merely seeking to exercise his right to present his case to a jury in open court.

Nevertheless, the Government may be placed in a difficult situation, not knowing until too late the extent of damage to be done by disclosure, and thus forced either to gamble or to not bring the prosecution in the first place.

For the past year, our colleagues on the House Intelligence Committee have been wrestling with this problem, attempting to reconcile the rights of the accused with the demands of national security. They have deliberated with the advice and assistance of the intelligence community, the Justice Department, legal scholars, civil liberties groups, defense attorneys, and others.

Finally on February 12 they reached what they believed to be a workable legislative solution to the handling of national security data in criminal cases. The committee unanimously reported H.R. 4736, the proposed "Classified Information Procedures Act." That bill, along with an administration proposal to deal with the graymail

problems, have been jointly referred to the House Judiciary Committee. (See p. 87 for text of H.R. 4736.)

Today we begin consideration of the graymail legislation. The Judiciary Committee has the special obligation to assure itself and the Congress that legislation affecting criminal procedure does not impinge on rights guaranteed by our Constitution. We will have several hearings on this legislation in the next few months. The Intelligence Committee has set a high standard in terms of the care with which they dealt with this bill and the unanimity with which they acted upon it. We will proceed with similar seriousness.

Our first witnesses today are representatives from the administration, which has been a strong advocate for such legislation.

From the Justice Department, we have Assistant Attorney General Philip Heymann of the Criminal Division.

With him are George W. Clarke, Associate General Counsel for Intelligence Community Affairs from the Central Intelligence Agency, and Virginia Dondy, Associate General Counsel at the Department of Defense.

Mr. Heymann will begin with an opening statement, and then all witnesses will answer questions—or perhaps my colleague from Massachusetts has something?

Mr. DRINAN. Well, I may make a contribution. My concern this morning, Mr. Chairman, is not "graymail" but Rosie Ruiz. [Laughter.]

I think that we ought to have a Federal investigation as this is clearly affecting interstate commerce; and the people of Boston are very interested in what the Department of Justice is going to do.

Mr. HEYMANN. We have been chastened by your subcommittee, Mr. Drinan, and we will not investigate any matter unless it has extremely substantial interstate contact. This one may measure up, but we haven't decided yet.

Mr. DRINAN. The people of Boston think it has global implications. [Laughter.]

Mr. EDWARDS. Well, Rosie is either a very good runner or a very good actor.

TESTIMONY OF PHILIP B. HEYMANN, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY GEORGE W. CLARKE, ASSOCIATE GENERAL COUNSEL FOR INTELLIGENCE COMMUNITY AFFAIRS, CENTRAL INTELLIGENCE AGENCY; AND VIRGINIA DONDY, ASSOCIATE GENERAL COUNSEL AT THE DEPARTMENT OF DEFENSE

Mr. HEYMANN. It is a pleasure to appear before the subcommittee.

This is a piece of legislation that we are very anxious to see moved. It's a rare piece of legislation. It's legislation that everyone in sight seems to want.

I hope that doesn't make anybody on the committee too suspicious.

It's favored by the ACLU, it's favored by the ABA, it's favored by the Justice Department, by my colleagues from the CIA, and the Department of Defense.

There is a bill close to being approved in the Senate Judiciary and Intelligence Committees. There is a bill out of the House Intelligence Committee.

The bill that I'll spend most of my time talking about, H.R. 4736, introduced by Congressman Murphy, and coming out of the House Intelligence Committee, is not our first choice; but everything here is so close to being acceptable to everybody that we don't want anything to slow the process.

We would think it a great contribution if the Congress could pass a graymail bill this year.

On the understanding, Mr. Chairman, that my written statement can go into the record, I'll be a little bit shorter and a little bit colloquial.

Let me explain a little bit how it comes about that there is such agreement on the need for a graymail bill. There are very few matters that are fundamental issues of procedure, criminal law, or national security on which there is this measure of agreement.

The answer is twofold:

First: The cases that are involved spread along a gamut of interest. The cases that will be affected by a bill like this are few each year, perhaps 5 or 6 or 10 total, I would guess; but some of them involve high executive officials, including—it could be any one of the three of us at this table—those with access to national security materials, whose criminal conduct it would be difficult if not impossible to investigate without some such bill as this.

In other words, people who have access in the executive branch to national security material have the prospect of delaying and, in fact, defeating any criminal investigation now.

The other category that's covered is spies, to be frank. In espionage cases we have substantial problems bringing the clearest of espionage cases in the worst of circumstances—for example, cash payment for transfer of documents to the Soviet Union—because of the problems of graymail.

Now, I want to make clear at the start with you, Chairman Edwards, that it is difficult if not impossible to distinguish good faith graymail from bad faith graymail. When I say graymail, I don't want to pick up all the connotations of blackmail, extortion, wrongdoing. To some extent it will be there.

Trials are competitive, adversary things, and if there's an advantage to be gained by demanding a document that you know the Government will not turn over, each of us would have to question whether a lawyer didn't almost have an obligation to demand that document on behalf of his client, at least if there were any plausible grounds for asking for it. You would have to be very sure that there were no plausible grounds before you failed to ask for it.

In some cases, graymail is a natural consequence, one without any intent to force us to back down on our present procedures. The simple fact is that the present process of a trial requires the Federal Government to guess what the defendant may want to introduce at trial in terms of classified national security secrets, and what the judge will permit the defendant to introduce, that is, what the judge will find relevant.

With us in a guessing posture, it becomes difficult to impossible for us to make an intelligent estimate of whether we ought to proceed in an ITT case or Kampiles case, one that involves high officials or one that involves espionage.

That leads me to the second reason why there is the strange measure of agreement across a broad spectrum on this bill, and that is,

what we are trying to do, and what everybody thinks, including myself, that we are doing, is only to eliminate guesswork.

If you like, this is a bill that prohibits waste, and nobody is here to defend waste.

Right now cases are not being tried simply because we can't tell what will happen at trial. The primary function of this bill is to bring, at an earlier stage and before a judge, the crucial decision that will enable us to make an intelligent and fair decision as to whether to proceed.

These bills are written in such a way that no substantive right, no procedural right is denied the defendant. The guesswork, the uncertainty, the dismissals where there was no need to dismiss are wrung out of the system.

There will still be a number of cases in which we will not be able to prosecute, because some national security matter that can't be handled in any other way and is very important to our national security is at the heart of the defendant's defense, or even relevant to a defendant's defense. So we can't do anything with it, and we will have to dismiss in that case.

But the mistakes, the cases where we don't have to dismiss, the cases where the defendant's every right can be protected, and still have us go to trial and not have high executive officials walking free because of the secrets that they have in their head, or spies walking free because of the secrets they have—these mistakes are going to be wrung out of the system.

So the measure of agreement is accounted for by the fact that it reaches a few cases, but a range of cases that are of interest to people who are concerned about wrongdoing by high Government officials and people who are concerned about espionage.

What it reaches is wastes, mistakes; it doesn't reach substantive rights.

Having said that, I think it would be worthwhile to walk you through the provisions of the bill, not in elaborate detail, but you can come back on any of those that you like; but just to tell you how it does what I have just said it does: wring out the mistakes.

I will refer to the House Intelligence bill. At the end I'll mention two things about the bill that we disagree with, and then I am going to say that if we could move this, if it would help move it, we will withdraw any contention as to one of them, the Jencks Act provision.

The first thing it does is to require a defendant before trial, right at the earliest stage, to notify the Government and the judge if the defendant plans to use classified materials.

I should say one other thing as I go through this:

Every provision in the bill—another reason why there's so little dispute about it—has precedent; precedent, for example, in that we do the same thing with regard to rape; we do the same thing with regard to informants. Each of them has precedent built into the present rules of evidence, the rules of criminal procedure, or the court decisions—or, I believe each of them has such precedent. You will generally find that there is a close analogy to every provision. Obviously there is such precedent as to pretrial hearings on complicated matters.

The fact that the defendant is going to bring up, is going to want to bring up, classified matter has to be brought up at the earliest stage.

Its purpose is to apprise the Government of the defendant's intention to disclose classified matters so that the Government may determine whether it would be necessary to seek a ruling pretrial from the judge as to whether it's going to be admissible.

It may be that the judge will look at it and say, OK, it's classified; do you want to admit it? Admit it. It doesn't matter to us.

This is very similar to rule 12 of the Federal Rules of Criminal Procedure and rule 412 of the Federal Rules of Evidence.

If the defendant doesn't let us know at that time, and let the judge know at that time, he can still introduce the evidence later if it comes up later; but, again, at a later stage of trial he's going to have to give us notice.

If he flagrantly disobeys the rule, I think the judge could tell him, no, you can't introduce that; for no good reason, you repeatedly failed to let us know about it.

Now, the second thing it does is, having given us notice, it allows for a pretrail in camera hearing, with the defendant and defense counsel there, but without the public there, to determine whether the classified information that the defendant wants to admit would be admissible, whether it would ever go in.

Upon certification by the Attorney General that a public proceeding may result in the disclosure of classified information, the pretrial determination would be made in camera—that would be with the judge, the defendant, and defense counsel present.

The purpose of the provision is to prevent the unnecessary abandonment of prosecutions or make it possible for the Government to determine in advance whether the evidence is going to go in.

The Government has to move for this pretrial proceeding. It can do it either in response to notice by the defendant or on its own initiative. The reason we have to be able to do it on on our own initiative is that cases do come up, and the ITT case was such a case, where we fear or suspect that the defendant plans to introduce classified information; yet, we want to determine that in advance, and we don't want to, ourselves, make clear exactly what it is.

I don't think it's worth spelling this all out. Sometimes it turns out that a defendant may, we think, want to bring out that somebody was a CIA agent. Now, that may very well be relevant at trial; but it may be the Government who goes into the court and says, pretrial, we would like a determination of the admissibility of issues relating to whether anybody in this case was a CIA agent.

Then the defendant will say, yes, there's something like that that we want to bring out. We are just flagging it. We want to determine whether Mr. Hyde was a CIA agent. We think that's relevant to the case. It will be argued our, pretrial.

The third thing the bill does is—and this one is very important—it provides for alternatives. Everybody agrees on this, too, alternatives to disclosure of specific classified information.

Let me continue with the example I just gave, with the indulgence of Mr. Hyde. Frequently a fair defense of the case doesn't require in any way the specifics of what was the name of the CIA agent, or what was the location of the defense installation, or what was the caliber of the artillery.

All a fair and full defense requires is that the defendant be able to bring out before the court that a CIA agent urged him to commit the crime, or that he was on a military installation.

On the other hand, frequently all that we care about as matters of national security are the specific names. We are honestly not worried about the embarrassment that comes, if we've done it, from admitting that a CIA agent urged Phil Hyde to commit a crime. If it's relevant at trial, we are happy to have it come out. He shouldn't have done it. We'll deal with it.

What we don't want is the relevation of the name.

So there's this happy meshing of gears. For a fair defense all you want is that a CIA agent urged him, coaxed him, offered him $500, did this and that, but without the name. That's all you need to prepare a defense. For national security preservation, all you need is that you don't tell the name, or the location of the submarine, or the caliber of the weapon.

The third thing the bill does is, it allows and encourages the substitution of summaries or stipulations for details that affect our national security.

Again, everybody favors that. The judge, of course, has to approve it.

The fourth thing it does—I don't know how often this will come up—is it reminds the judge that if the situation gets hopeless, if he rules that yes, indeed, this information is relevant to the defense—remember, we're not taking anything away from the defense that will help it; the statute is written that way—yes, indeed, it's relevant to the defense; no, you can't get away with a substitute; there's no way to substitute anything for this; then the fourth thing it does is, the bill says to the judge, you can dismiss the case, then, if you want; you can't reveal the secret. You can dismiss the case, but before you dismiss the case, remember, you may just want to dismiss one count of the indictment, if it only goes to one count of the indictment.

It encourages the judge to adopt the least restricted, completely fair sanction against the Government. There were, when last counted, about 2,500,000 precedents for that provision; which simply says don't do more than you have to to make things fair.

The fifth thing the bill does is that it allows the Government to appeal from an order of a judge which says, you have to reveal this secret if you want the trial to go on.

If you wonder why the defendant doesn't have a right to appeal, it is because the defendant, of course, has a right to appeal that type of issue or any other issue after trial; the Government has no right to appeal after trial in a criminal case.

So it gives us an interlocutory appeal if the judge says, tell the secret while we say, a summary is absolutely adequate. The bill has in it a provision for an expedited appeal where it can be resolved, pretrial, at the appellate level, and quickly. This is a very important provision.

I've almost run out of important provisions. There are additional provisions for the protection of classified information. We need them. I shouldn't say that it is not important; it's just not controversial; the provisions for protective orders are in this group.

The House Intelligence Committee improved on its initial draft in a couple of ways that I want to call to your attention; then I am going to stop talking.

We think that this bill has reciprocity provisions. We try honestly to disagree with things that are unnecessary, that aren't required by any sense of fairness, but we are not fighting them. We see this amazing

confluence of everybody concerned and we don't want to make a fuss about that.

The House Intelligence Committee made the reciprocity provisions at least a little fairer to us, we think, and a little bit more sensible, and we appreciated that.

There are great problems of difficulty with regard to reporting requirements. The Senate bill had reporting requirements, requiring us to put in writing exactly why we dismissed each case or didn't prosecute each case. The House Intelligence Committee has adopted annual reporting requirements of a more general form.

We urge that strongly. Specific case reporting requirements are likely to be very offensive to the privacy of the individuals who are involved in the case, very unfair to the individuals. It endangers national secrets in a way that makes us nervous. It is an unprecedented review on a case-by-case basis of prosecutorial discretion.

It's even difficult to apply, because the fact of the matter is, I have to personally approve each of these, and when I look at them, I have the Defense Department or CIA saying, we are quite anxious to protect this secret; I have my line section saying, it's really a relatively lousy case that we are not likely to win; I have my appellate section saying, this is going to raise an issue that's going to cause trouble. All the factors go into effect at once.

The House Intelligence Committee again requires more reporting than we are at all happy with, but somewhere it's in the ballpark, and I am not screaming about anything except that it would be wonderful to go on with this bill.

We have asked, and I think again it is correct that before a judge requires classified information to go in, it ought to be a touch more important than merely relevant. It ought to be up to the standards required when evidence about an informant goes in the standard in the *Roviaro* case of relevant and helpful.

No committee that we've talked to—and I've now talked to the Senate and the House Intelligence Committees, and this committee now, Mr. Edwards—has been anxious to change the rules in any way as to admissibility here, and I think we would believe it was sensible to leave that simply for judicial determination.

That's an issue again that we wanted, and I'd like to move the bill on, rather than fight about issues like that.

The last one, which is the one that in many ways concerns the American Civil Liberties Union most, is a proposed amendment of the Jencks Act to allow us to do extremely sensible and fair things, hurting no one in the world.

I still believe it's correct as a matter of principle, but I would like to drop our amendment to the Jencks Act, which we want, and will need in some cases, although not in most. I would like to drop it, and I hereby say to this committee, Mr. Edwards, that if we can move the bill out, we won't fight for an amendment to the Jencks Act.

I've talked to Dan Silver; I've talked to Mr. West; I am dropping things because the contribution to the welfare of the country of getting any one of these bills, the House Intelligence Committee, the Senate bill, the administration bill, is so great that I don't want any chance that dispute about specific relatively minor terms will hold us up.

Thanks, Mr. Edwards.

[The full statement follows:]

Department of Justice

STATEMENT

OF

PHILIP B. HEYMANN
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
HOUSE OF REPRESENTATIVES

CONCERNING

GRAYMAIL LEGISLATION - H.R. 4736

ON

APRIL 24, 1980

Chairman Edwards and members of the Subcommittee, I am pleased to appear before you today to discuss H.R. 4736, a bill introduced by Congressman Murphy which addresses the problems posed by classified information in criminal cases. Two other bills which respond to this issue have been introduced -- H.R. 4745, an Administration bill introduced by the Chairman of the House Judiciary Committee, Congressman Rodino, and S. 1482, introduced by Senator Biden, Chairman of the Rights of Americans Subcommittee of the Senate Intelligence Committee and of the Criminal Justice Subcommittee of the Senate Judiciary Committee. I have been privileged to testify in the hearings which have been held on these bills in the Senate Subcommittee on Criminal Justice and in the House Permanent Select Committee on Intelligence. In February, the House Intelligence Committee approved H.R. 4736, as amended.

The formulation of these three bills, which are substantially similar in their major contours, was the result of lengthy, frank, and productive discussion by members of the Congress and their staffs, members of the intelligence community, the ABA, the defense bar, the ACLU, and the Department of Justice. As I noted at the introduction of these bills in July of last year, the differences between them "are overshadowed by the similarities in the basic approach taken ... and by a common recognition of the need for a legislative response to the graymail problem."

In the months since the introduction of these bills, the Department of Justice has continued to work with the Congress and other interested groups to resolve our remaining differences. I believe that at this stage we are very close to reaching a consensus on a bill which will provide needed procedures for dealing with criminal cases in which the disclosure of classified information is at issue and which will meet both the need to protect against the unnecessary disclosure of highly sensitive national security information and the need to preserve the defendant's right to a fair trial. I em therefore pleased, Mr. Chairman, that you have acted expeditiously in calling this hearing on H.R. 4736 so that we may explore any remaining differences and move forward with this much needed legislation.

In my testimony today, I will first briefly discuss the problems we currently face in criminal prosecutions involving national security information and the reasons why I believe there is a need for legislation to resolve those problems. Second, I will comment on the key provisions of H.R. 4736 as reported by the House Permanent Select Committee on Intelligence, and note the significant improvements made by the amendments of H.R. 4736 passed by the Committee. Finally, I will discuss major differences between H.R. 4736 and the Administration bill, H.R. 4745.

I. THE "GRAYMAIL" PROBLEM

Two of the most important responsibilities of the Executive are the prosecution of violations of federal criminal laws and the protection of our national security secrets. Under present procedures, these responsibilities far too often conflict forcing the government to choose between accepting the damage resulting from disclosure of sensitive national security information and jeopardizing or abandoning the prosecution of criminal violations. The government's understandable reluctance to compromise national security information invites defendants and their counsel to press for the release of sensitive classified information the threatened disclosure of which might force the government to forego prosecution. "Graymail" is the term that has been applied to describe this tactic. However, the "graymail" problem is not limited to instances of unscrupulous or questionable conduct by defendants since wholly proper defense attempts to obtain or disclose classified information may present the government with the same "disclose or dismiss" dilemma.

To fully understand this problem, it is necessary to examine the decision making process in criminal cases involving classified information. Under present procedures, decisions regarding the relevance and admissibility of evidence are normally made as they arise at trial. In advance of trial, the government must guess whether the defendant will seek to disclose certain classified information at trial and speculate

whether it will be found admissible if objected to at trial. In addition, there is the question whether material will be disclosed at trial and the damage inflicted before a ruling on the use of the information can be obtained. Without a procedure for pretrial rulings on the disclosure of classified information, the deck is stacked against proceeding with prosecution of these cases because without a pretrial determination of which items of classified information may be ultimately disclosed at trial all of the sensitive items that might be disclosed must be weighed in assessing whether the prosecution is sufficiently important to incur the national security risks.

Thus, in the past, the government has foregone prosecution of conduct it believed to violate criminal laws in order to avoid compromising national security information. The costs of such decisions go beyond the failure to redress particular instances of criminal conduct. Such determinations foster the perception that government officials and private persons with access to military or technological secrets have a broad de facto immunity from prosecution. This perception not only undermines the public's confidence in the fair administration of criminal justice but also promotes concern that there is no effective check against improper conduct by members of our intelligence agencies.

While only a very small percentage of criminal cases present classified information questions, these cases often involve matters of considerable public interest. Moreover, we are increasingly confronting classified information issues

in a wide range of cases including espionage, perjury, burglary, and civil rights violations, among others. The new Foreign Corrupt Practices Act and the possible enactment of a charter for intelligence activities can be expected to expand the number of cases in which the graymail problem will arise.

The Justice Department has endeavored to resolve problems posed by classified information as they arose in individual criminal cases. Our experience with such an ad hoc approach has convinced us of the need for a legislative response to the graymail problem. Only by establishing a uniform set of procedures for resolving classified information issues prior to trial can the speculation and irrationality be removed from the present system.

Currently, the government can make only a rough and poorly informed assessment of the national security costs of a prosecution in which classified information may be at issue. Under the procedures contained in H.R. 4736, we would be able to determine whether in fact there was an actual conflict between our prosecutorial and national security responsibilities, and if so, to make an informed assessment of the costs of continuing prosecution.

While it is not possible to eliminate the tension between the Executive's responsibility to prosecute crime and its duty to protect the integrity of sensitive national security information, the procedures contained in H.R. 4736 would significantly enhance the government's ability to discharge these responsibilities without jeopardizing the defendant's right to a fair trial.

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II. H.R. 4736

H.R. 4736, which has been amended and approved by the House Permanent Select Committee on Intelligence, addresses a wide range of procedural issues involving classified information that may arise in the context of a criminal prosecution. These procedures, which provide for pretrial rulings and appeals on whether classifed information may be disclosed by a defendant at pretrial or trial proceedings will promote necessary uniformity and predictability. Moreover, in achieving this goal, the bill would require only modest procedural changes in the manner in which criminal cases involving classified information are to be conducted. The primary effect of the bill would be to alter the timing of rulings on the admissibility of evidence. Essentially, the major features of the bill are rooted in statutory provisions and procedural rules that now apply to the conduct of criminal cases. Furthermore, the provisions of H.R. 4736 are designed so as to assure that there is no diminution of the defendant's right to a fair trial.

A. Key Provisions of H.R. 4736.

1. Defense notice of intent to use classified information.

Under section 102(a)(1), the defense is required to inform the court and the government, before trial, of any classified information it intends to disclose at trial or at a pretrial proceeding. This notice requirement is the initial step in the procedure created by the bill for pretrial determinations concerning the admissibility of classified information. Its purpose is to apprise the government of the defendant's intent to disclose classified information at trial, so that the

government may determine whether it will be necessary to seek a pretrial disclosure ruling regarding the information. Similar notice requirements appear in the rape evidence rule (Rule 412 of the Federal Rules of Evidence) and in Rules 12.1 and 12.2 of the Federal Rules of Criminal Procedure which require notice of the defendant's intent to raise an alibi or insanity defense, respectively.

Consistent with the purpose of the notice requirement, the defendant may not disclose the information at issue until the government has been afforded an opportunity to obtain a predisclosure ruling as provided in section 102. Furthermore, the bill provides for prior notice of intent to disclose classified information at the trial stage in those situations in which the defendant could not have anticipated at an earlier time that he would wish to reveal such information.

2. Pretrial, in camera determination of the admissibility of classified information.

The core feature of H.R. 4736 is its provision for a pretrial determination of the admissibiltiy of classified information. Upon certification by the Attorney General that a public proceeding may result in the disclosure of classified information, the pretrial determination is to be made in camera .

The purpose of this provision is to prevent the unnecessary abandonment of prosecutions by making it possibile for the government to ascertain, in advance, whether the classified information at issue will be permitted to be disclosed at trial. This advance determination of admissibility, coupled with subsequent determinations concerning the use of alternatives

to disclosure of specific classified information, and concerning the sanctions that will be imposed for the government's objection to disclosure of classified information found to be admissible, will equip the government to make an informed assessment prior to trial of the national security costs of continuing the prosecution as well as the risk to its successful prosecution of the case by refusing to permit disclosure.

The government may move for a pretrial proceeding concerning the classified information either in response to notice given by the defendant or on its own initiative. Thus the government has the opportunity to obtain a pretrial disclosure ruling on all the classified information issues that might have a bearing on its decision to continue prosecution.

When the government requests a pretrial ruling on the disclosure of classified information, it must identify the information that will be at issue. Where the information in question was provided to the defendant by the government, the specific information is to be identified. However, in other circumstances, the government is permitted to identify the information by generic category. This approach, which might include a category such as "the identity of CIA agents" might be used in situations where the defendant may not be aware of the particular information of concern to the government or may be uncertain of its accuracy. Without this "generic category" option, the government would be forced to choose between compromising classified secrets by confirming the accuracy of the information or providing previously undisclosed information to the defendant and failing to obtain a pretrial ruling and so risking public exposure of the information at trial.

The generic categories used by the government to identify the information which will be at issue at the pretrial proceeding are subject to the approval of the court. This requirement of judicial approval will guard against the use of overly broad categories and insure that the categories are appropriate to describe the information of concern to the government.

3. Alternatives to disclosure of specific classified information.

Once the court has determined in the initial pretrial proceeding that the classified information at issue is admissible, the government nonetheless may move that, in lieu of authorizing the disclosure of specific classified information, the court order substitution of a summary or a statement admitting relevant facts. The court must grant the government's request if it finds that the statement or summary will "provide the defendant with substantially the same ability to make his defense."

It is at this stage, under H.R. 4736, that the focus of the pretrial proceeding is to shift to a consideration of the classified nature of the information sought to be disclosed. In support of its motion, the government may submit an affidavit certifying that disclosure of the specific information would cause damage to the national security and setting out the basis for the classification. At the government's request, the affidavit is to be reviewed by the court in camera and ex parte. However, the defendant has a full opportunity to contest the adequacy of the substitute at a full hearing. This provision

will permit the government to continue prosecution and avoid disclosure of sensitive national security information while assuring that the defendant will be able to use any classified information necessary to his defense.

Under section 109(b), similar provision is made for the use of substitutes for the disclosure of specfic classified information at the discovery stage. In our judgment, existing discovery rules would permit such substitutions. Rule 16(d)(1) of the Federal Rules of Criminal Procedure provides that "upon a sufficient showing, the court may at any time order that discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate." The Notes of the Advisory Committee concerning Rule 16(d)(1) list among the considerations that may be taken into account by the court the protection of information vital to the national security. However, section 109(b) of this bill would provide needed clarification and guidance.

4. Sanctions other than dismissal.

If the court determines that the defendant may disclose specific classified information, and the Attorney General files an affadavit objecting to such disclosure, the court is to order the defendant not to disclose the information. It is then the court's task to fashion an appropriate remedy for the government's denial of the defendant's use of the information. We view as important section 105(b)'s recognition that this sanction need not always be dismissal of the entire indictment. Listed under section 105(b) are examples of lesser sanctions

that may be imposed. Like other decisions by the court adverse to the government which occur in the predisclosure proceedings under H.R. 4736, the government may appeal the imposition of these sanctions. This permits the government to make the crucial "disclose or dismiss" decision with a full understanding of the costs involved.

5. Interlocutory appeal by the government.

Section 108 of H.R. 4736 would authorize the government to take interlocutory appeals from adverse district court orders relating to the disclosure of classified information. Inclusion of this provisions is a key element in addressing the graymail problem. At present, the government is powerless to obtain appellate review of these important district court rulings. Instead, the government must either compromise the national security information by permitting its disclosure during the course of the prosecution or withhold the information and run the risk of incurring the sanction of dismissal of the case.

Congress has empowered the United States to appeal orders of a district court suppressing or excluding evidence in a criminal case. See 18 U.S.C. §3731. A similar provision authorizing interlocutory appeals of orders requiring the disclosure of sensitive national security information is warranted since such orders may have even a more dramatic impact on a prosecution than a suppression ruling.

This section also responds to the defendant's interest in a speedy trial by providing for an expedited appeal.

6. Preservation of the integrity of classified information: protective orders and the development of security procedures.

Two sections of H.R. 4736 address the problem of protecting against the compromise of national security information. Section 109(a) provides that upon the motion of the government the court is to issue an order to protect against the disclosure of classified information provided by the government to the defense. The authority of the federal courts to issue such protective orders is well established. The Report of the Intelligence Committee on H.R. 4736 lists examples of the kinds of protective provisions that might be included in such an order.

Section 110(a) directs the Chief Justice to promulgate security procedures to protect against the compromise of classified information submitted to the federal courts. At present, the handling of such materials is often the subject of ad hoc arrangements developed in each case.

B. Improvements to H.R. 4736 worked by amendments approved by the House Permanent Select Committee on Intelligence.

In two respects, H.R. 4736 as reported by the Permanent Select Committee on Intelligence is, in the judgment of the Department of Justice, a significant improvement over the bill as introduced. The Administration bill, H.R. 4745, contains neither reciprocity or reporting requirements. On the other hand, H.R. 4736 as introduced contained expansive reciprocity and reporting requirements which were of serious concern to the Department. Responding in part to these concerns which I raised in my testimony before the Intelligence Committee, the Committee approved significant amendments to these provisions.

1. Reciprocity requirements.

Although the Administration bill contains no reciprocity requirements, the Department of Justice is not opposed to reasonable reciprocal disclosure by the government where the defendant is required in the course of the pretrial proceedings prescribed by the bill to reveal information concerning his case which would not otherwise be available to the government. H.R. 4736, as introduced, would have automatically required the government, whenever the defendant was authorized to disclose classified information, to provide the defendant with a bill of particulars, and the information and the identity of witnesses it expected to use to "rebut" the classified information at issue. As such, these provisions were not genuinely reciprocal, for they would have required substantial additional disclosure by the government even where the classified information to be disclosed by the defendant was originally provided by the government. (Indeed, it is anticipated that in most cases, the classified information sought to be disclosed by the defendant will be supplied by the government as part of the discovery process.) The operation of these provisions, then, often would have placed a disclosure burden on the government not matched by any similar disclosure by the defendant. In our view, such automatic expansion of the defendant's discovery rights would undermine the very purpose of the legislation by providing defendants with additional incentives to press for disclosure of classified information.

Of particular concern to the Department was the requirement that we disclose the identities of our witnesses. Since the bill does not require the defendant to disclose the identity of his witnesses, those instances in which the identity of defense witnesses would be revealed in the course of the required pretrial disclosure determinations would be quite limited. In addition, we were very much concerned that mandating automatic disclosure of the identities of our witnesses would create a significant potential for harm to or intimidation of witnesses and for the subornation of perjury. Unfortunately, past experience has clearly demonstrated the dangers of intimidation and corruption of witnesses where their identity is made known in advance of trial.

The amendments to the reciprocity provision of section 107 approved by the Intelligence Committee have done much to meet these concerns. First the addition of section 107(d) provides that the reciprocity requirements are not to be automatically invoked where the information to be disclosed by the defendant was provided by the government. This then will more accurately reflect a reciprocal disclosure burden on the prosecution and defense. Second, the disclosure of government witnesses is, in all cases, to be discretionary with the court. In exercising this discretion, the court is to be guided by considerations of 1) the nature and extent of the defendant's disclosure, 2) the probability of harm to or intimidation of witnesses, and 3) the probabilitiy of identifiable harm to the national security.

2. Reporting requirements.

H.R. 4736, as introduced, contained detailed reporting requirements which mandated that the government file a a written report with the House Permanent Select Committee on Intelligence and the Select Intelligence Committee of the Senate whenever "the United States decides not to presecute any individual for a violation of federal law becuase there is a possibility that classified information will be revealed." The contents of these reports were to include 1) findings detailing the reasons not to prosecute, 2) identification of the classified information that might be revealed, 3) the purpose for which the information might be revealed, 4) an assessment of the probability of such disclosure, and 5) the possibile consequences of such disclosure on the national security.

The Department of Justice firmly opposed the inclusion of such a reporting requirement which calls for a detailed written justification of the exercise of our prosecutorial discretion on a case-by-case basis. There is, to my knowledge, no precedent for such an incursion into the Executive's traditional responsibilities. Furthermore, we are unaware of any pattern of intransigence on the part of the Department or failure to accomodate the needs of the Intelligence Committees that would warrant the type of reporting requirements which were originally included in H.R. 4736.

It is my understanding that the Department has undertaken in the past to brief these Committees on an informal basis on aspects of particular cases. I would suggest that a continuation

of such a flexible, informal process is more in keeping with the proper roles of two co-equal branches of government.

The Intelligence Committee's approval of an amendment to the original reporting requirements of H.R. 4736 renders them considerably less objectionable from the Department's perspective. Section 202, as amended, directs the Attorney General to report to the House and Senate Intelligence Committees summaries of cases in which indictments are not sought or prosecutions are dismissed because of the danger that classified information would be revealed. This report is to be filed annually. I believe it is significant that the very Committee which is to receive these reports found merit in the arguments we advanced and rejected the imposition of the detailed reporting requirements of H.R. 4736 as introduced.

III. MAJOR PROVISIONS OF THE ADMINISTRATION BILL NOT INCLUDED IN H.R. 4736.

The Administration's bill, H.R. 4745, contains two major provisions which are not included in H.R. 4736. These are a "relevant and material" admissibility standard for classified information and a limited modification of the Jencks Act. The reasons for the inclusion of these provisions is set out briefly below.

A. Admissibility Standard for Classified Information.

Under the Administration's bill, the standard for the admissibility of classified information was to be whether the information was "relevant and material to an element of of the offense or a legally cognizable defense." We believe that the significant governmental interest in nondisclosure

requires that a more demanding standard than mere relevance apply in determining the admissibility of information concerning vital national security matters. The "relevant and material" standard we proposed was based on the standard adopted by the Supreme Court in Roviaro v. United States, 353 U.S. 53 (1957) for determining whether the defendant is entitled to obtain and disclose the identity of a government informant in a criminal case. Noting the important "public interest in effective law enforcement" served by the protection of the identity of informants, the Court ruled that disclosure of such information is not required unless the information is "relevant and helpful to the defense of an accused or is essential to a fair determination of a cause." 353 U.S. at 59, 60-61. We believe that a similar standard would be appropriate in cases involving national security matters, for the interest in protecting the confidentiality of classified information is equally, if not more compelling as that in protecting the identities of government informants.

Nonetheless, there has been considerable opposition to the inclusion of the Administration's "relevant and material" standard for the admissibility of classified information, and its adoption was rejected by the House Intelligence Committee. In the Committee's Report which accompanies H.R. 4736, it was stressed that "[i]t is the intent of the Committee that existing standards of use, relevance, and/or admissibility of evidence not be affected by H.R. 4736." H.R. Rep. No. 96-831, 96th Cong. 2d Sess. 14 (1980).

B. Limited Modification of the Jencks Act.

Currently, the Jencks Act (18 U.S.C. §3500) would require the disclosure of classified information contained in the statement of a government witness which, though related to the subject matter of the witness' testimony, is not at all inconsistent with the witness' testimony and thus of no value for impeachment purposes. Therefore, in the Administration's bill, we proposed that if the court found that disclosure of the classified information contained in the witness' statement would damage the national security and that portion of the statement were consistent with the witness' testimony, the court could excise that portion of the statement before it was delivered to the defense.

We believe that this proposed modification is entirely in keeping with the purpose of the Jencks Act which is to assist the defendant in impeaching the testimony of government witnesses. Precedent for permitting the review of Jencks Act statements and the deletion of materials by the court prior to delivery of the statement to the defendant already exists in subsection (c) of the Act, which requires the court to excise portions of the statement that are found not to relate to the subject matter of the witness' statement. Furthermore, it is important to emphasize that the issue of this proposed modification of the Jencks Act is one of policy, not consitutional law. As the Supreme Court made clear a decade ago in its unanimous opinion in United States v. Augenblick, 393 U.S. 348, 356 (1969): "the Jencks decision and the Jencks Act

were not cast in constitutional terms. Palermo v. United States, [360 U.S. 343] at 345, 360. They state rules of evidence governing trial before federal tribunals; we have never extended their principles to state criminal trials."

Nonetheless, the proposed modification of the Jencks Act set out in the Administration bill has been the subject of considerable controversy. We believe the potential for prejudice to the defendant from the proposed limitation on the Jencks Act's disclosure provisions is extremely remote. Absent the inclusion of such a provision, the United States may needlessly be forced to forego the use of a crucial witness, drop a prosecution entirely, or compromise sensitive national security information. Fortunately, this problem can be expected to arise relatively infrequently, although in those cases in which it does arise, prosecution of the case may be seriously jeopardized. We will be prepared to accept the Committee's resolution of this issue, in order to speed passage of the bill.

CONCLUSION

I believe that we are now nearing final agreement on a graymail bill that will be acceptable to all parties concerned. As I noted above, H.R. 4736 will require only modest procedural changes in the manner in which criminal cases involving classified information are conducted. Yet by providing much needed uniformity and predictability through procedures which permit the orderly resolution prior to trial of the problem of disclosure of classified information, such legislation would provide an equitable and reasonable approach to the troublesome issues arising in criminal prosecutions involving sensitive national security information.

While there will always be cases in which the risks of revealing highly sensitive classified information will be too great to permit prosecution, legislation such as H.R. 4736 would permit a significant number of cases to proceed to trial which otherwise could not be pursued because of the government's current inability to make an informed assessment of the risks of continuing prosecution.

Mr. EDWARDS. Thank you.

Mr. Clarke, I believe you have a statement?

Mr. CLARKE. Yes, sir. Very well, I will read Mr. Silver's statement.

Mr. Chairman and members of the committee, I appreciate the opportunity to testify concerning H.R. 4736, the "Classified Information Criminal Trial Procedures Act," as reported by the House Permanent Select Committee on Intelligence on February 12.

The so-called graymail problem which this bill addresses is one of the most pressing concerns that I face in carrying out my duties.

I might add, Mr. Chairman, at this point that during the 6 years that I have been with the General Counsel's Office, we have had all of the major cases which have given the major impetus to this bill that the committee is now considering.

I would just like to mention those cases right at the beginning: that of the *United States* v. *Moore*, which was an espionage prosecution; *United States* v. *Boyce and Lee*, which were also espionage prosecutions; the *United States* v. *Kampiles*, which was also an espionage prosecution.

Indeed, Admiral Turner has told me on several occasions that of all the difficult decisions he has faced as Director of Central Intelligence, some of the most agonizing have involved the tension between his statutory duty to protect intelligence sources and methods and his desire to facilitate enforcement of the criminal laws of the United States. I know that he wholeheartedly supports enactment of "graymail" legislation, and he testified to this effect before the Senate select committee over 1½ years ago.

I will make a few brief remarks about specific features of H.R. 4736 as compared with the administration's own proposal and, of course, I will defer to Mr. Heymann on those issues which he feels should be dropped in the interest of moving forward.

However, I would like to point out that the Agency feels that some of those provisions will provide greater protection to sensitive classified information of interest to the Agency.

I wish to make it clear at the outset, however, that in my view the differences among the two House bills are of much less importance than the common features of the proposed legislation.

Enactment of any of these measures would be a significant improvement over the situation that exists today.

Both bills, for example, provide for a pretrial conference to consider matters relating to classified information that may arise in connection with a prosecution.

Both bills permit this conference to be held in camera and provide for an interlocutory appeal.

In addition, both bills allow for alternative forms of disclosure to protect classified information.

Both bills permit writings, recordings and photographs containing classified information to be admitted into evidence without change in its classified status.

Under current law and practice, criminal litigation in which classified intelligence information may be involved creates severe problems for the intelligence community. These problems arise in three main areas.

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If I could just summarize those, the first, as I mentioned are the espionage prosecutions, where I have mentioned specific cases.

The second area are those cases which involve violation of other laws, but which somehow tangentially involve classified intelligence information. The ITT-Chile prosecution Mr. Heymann referred to was one such case.

The third area in which the legislation would be of a significant benefit are those cases in which intelligence community or other employees who have had access to classified information may be charged with a criminal offense. It would be useful to have these procedures to prevent the disclosure of information in these cases during the course of trial.

The great advantage of both H.R. 4836 and H.R. 4745 is that these bills would bring about a substantial reduction in the number of difficult and often unnecessary confrontations between the interests of criminal law enforcement and the protection of intelligence sources and methods.

They would do so by clearly confirming the power of the courts to employ procedures that will bring a measure of certainty and predictability to the prosecutorial decisionmaking process.

The most important feature of the bills is that they create a procedural framework for orderly determination of what sensitive information will be needed to support a prosecution.

The essential features of this framework are—and I don't think I need to cover those, Mr. Chairman; Mr. Heymann has covered them very adequately.

The administration's bill contains a number of provisions, lacking in H.R. 4736, that would remedy troublesome problems which now confront the Government during the course of a graymail prosecution. I would like to draw the committee's attention to some of the differences in the two bills and suggest that the committee consider adoption of these provisions.

One major difference between H.R. 4736 and the administration's bill is the omission in H.R. 4736 of the specific "relevant and material" finding that a court must make before classified information can be used at a pretrail or a trial proceeding.

We would, or course, prefer the stricter language of the administration bill in order to protect classified information from unnecessary disclosure.

What this means is, as Mr. Heymann pointed out, that it requires a higher standard before evidence that is classified in nature could be admitted at the trial.

We feel the higher standard should be adopted, as this will give our information greater protection and will obviate the need to go into such areas which aren't really key or central to the defendant's case.

A second major difference between H.R. 4736 and H.R. 4745 is that H.R. 4736 omits section 8(c) which would permit the Government to prove the contents of a classified document without introducing the original or a duplicate into evidence.

This is a so-called modification of the best evidence rule.

The House version, as reported, addresses this issue with regard only to the pretrial discovery process. I would strongly urge the committee to include a section in H.R. 4736 which would extend the protection to the courtroom.

Such a section would allow other evidence, such as testimony, to prove the matters for which a document would otherwise be admitted into evidence and thus enable the Government to protect classified information in the document from unnecessary disclosure during the trial.

This provision could be particularly useful in a case under 18 U.S.C. 794, involving an unsuccessful attempt to deliver classified documents to an agent of a foreign government. Where attempted espionage has been nipped in the bud, it would be particularly unfortunate if the Government had to disclose publicly the very information it had prevented the defendant from passing to a foreign power.

By relying on testimony to prove that the particular documents involved were related to the national defense, the Government could minimize the damage to the national security that would result from introduction of the documents in evidence.

Through testimony, the Government would be able to focus on specific matters of its choice to prove that a given document relates to the national defense, without exposing the entire document at public trial. Classified photographs are a type of documentary evidence for which subsection 8(c) of H.R. 4745 would seem particularly well suited.

The defendant would be free, of course, to cross-examine in detail on any matter put into evidence by the Government or to introduce classified information on his own behalf if notice has been given under section 5 and the procedure established by section 6 has been followed.

Section 109(a) of H.R. 4736 allows a court to enter a protective order but does not define the acceptable scope of such an order in the statute. In contrast, the analogous section of H.R. 4745 lists seven specific items that may be included in such a protective order.

I note, however, that the House Intelligence Committee has enumerated these items explicitly in the committee report accompanying the bill. While such legislative history is useful, statutory language is more authoritative, and I think it would be more helpful to us.

Thus, I would urge this committee to include the specific examples in the legislation.

Experience in the cases I related to you has demonstrated that these items are the most important kinds of protective provisions necessary to preserve the security of intelligence information, and that the courts sometimes are in doubt as to whether they have the power to use them. The list is permissive rather than mandatory, but serves a useful purpose in making clear the authority of the courts to order certain protective measures.

Mr. Heymann has given his views as to the Jencks amendment, and I think we prefer his views on that.

Additionally, I would like to briefly comment on the provisions of H.R. 4736 that I consider particularly important:

Section 102(f) would permit the Government to object during the examination of any witness to a question or line of inquiry that may result in the disclosure of classified information that has not been found previously to be admissible pursuant to the procedure established by section 102.

This provision is of great importance in order to prevent the intentional or inadvertent premature disclosure of classified information at trial, by permitting the Government to object and obtain a ruling

from the court on the basis of the in camera procedure established by section 102.

Section 109(b), which would allow the Government, during the pretrial discovery process, to substitute a summary or a statement of facts in lieu of specific items of classified information that the court has ruled the defendant is entitled to discover or inspect, is indispensable. Without it, the remaining protections in the bill can be rendered nugatory by aggressive discovery tactics on the part of defendants.

Section 109(d) employs the court to order the excision of part or all of the classified information contained in a document to be admitted in evidence. This provision will allow for the protection of classified information not central to the purpose for which the document is to be admitted into evidence.

The Government was able to delete some sensitive, classified information from the highly classified manual that was involved in the *Kampiles* espionage prosecution because the defendant gave his consent. Section 109(a) would allow the court to order such deletions over a defendant's objection.

A particularly important feature of the bill, found in section 109(c), provides for documentary evidence to be admitted at trial without change in its classification status.

This would permit the Government to introduce a document classified secret as it is, with no requirement for formal declassification or removal or classified markings.

In the past, CIA and other entities of the intelligence community have been called upon by the Department of Justice to declassify documents said to be needed to support a prosecution. If such documents are validly classified, however, it makes little sense to call for their declassification simply because they will be used in some fashion at trial.

Declassification necessitates a finding that public disclosure will not harm the national security, a finding at odds with an essential element of the crime under many of the espionage statutes.

Furthermore, the rules on classification do not require that a document be declassified in order to be shown to a limited number of uncleared users, if circumstances make it in the interest of national security to do so.

The use at trial of a validly classified document recognizes the reality of a situation in which a national security risk is being taken to achieve a law enforcement purpose that cannot be achieved without some risk.

Under section 109(c) it would be left up to the agency involved to determine if a particular document has been so compromised through use at trial as to require formal declassification. If no declassification is called for, such a document would be subject to continued protection under the security procedures called for by section 110.

In closing I would like to thank the committee for this opportunity to present the CIA's views on this important legislation, and to commend the committee for its efforts to find a solution to the legitimate but painful dilemmas that arise when sensitive intelligence information is drawn into the prosecution of criminal cases.

I believe H.R. 4736 contains the elements of a sound and equitable solution to the graymail problem, although it could be strengthened in the ways I have mentioned.

If this legislation is enacted, I am confident that the Director of Central Intelligence, the intelligence community, the CIA, and the Department of Justice will be able largely to eliminate the graymail phenomenon and to protect legitimate national security information from unnecessary disclosure.

At the same time, I am confident that there will be no infringement on the principles of impartial enforcement of the laws and a fair trial.

Thank you, Mr. Chairman.

[The full statement follows:]

STATEMENT OF DANIEL B. SILVER, GENERAL COUNSEL, CENTRAL INTELLIGENCE AGENCY

Mr. Chairman and members of the committee, I appreciate the opportunity to testify concerning H.R. 4736, the "Classified Information Criminal Trial Procedures Act," as reported by the House Permanent Select Committee on Intelligence on February 12. The so-called "graymail" problem which this bill addresses is one of the most pressing concerns that I face in carrying out my duties. New law to deal with this problem is a principal legislative priority of the Central Intelligence Agency. Indeed, Admiral Turner has told me on several occasions that of all the difficult decisions he has faced as Director of Central Intelligence, some of the most agonizing have involved the tension between his statutory duty to protect intelligence sources and methods and his desire to facilitate enforcement of the criminal laws of the United States. I know that he wholeheartedly supports enactment of "graymail" legislation.

I will make a few brief remarks about specific features of H.R. 4736 as compared with the administration's own proposal. H.R. 4745. I wish to make it clear at the outset, however, that in my view the differences among the two House bills are of much less importance than the common features of the proposed legislation. Enactment of any of these measures would be a significant improvement over the situation that exists today. Both bills, for example, provide for a pretrial conference to consider matters relating to classified information that may arise in connection with a prosecution. Both bills permit this conference to be held in camera, and provide for an interlocutory appeal. In addition, both bills allow for alternative forms of disclosure to protect classified information. Both bills permit writings, recordings, and photographs containing classified information to be admitted into evidence without change in its classified status.

Under current law and practice, criminal litigation in which classified intelligence information may be involved creates severe problems for the intelligence community. These problems arise in three main areas:

The first is cases of espionage or unauthorized disclosure of classified information. In my experience, first as General Counsel of the National Security Agency and now as General Counsel of the Central Intelligence Agency. A substantial number of unauthorized disclosures and acts of espionage have not been pursued because it was evident that prosecution would force the Government to risk disclosing additional, even more damaging, classified information. To the extent that new law can ameliorate this problem, the intelligence community believes there is a pressing need to do so.

A second area of great concern is enforcement of the criminal laws in matters not directly affecting the interests of the intelligence community. In a variety of situations, tangential involvement of intelligence agencies with persons accused of crimes has enabled such persons to exploit the threat of disclosure of intelligence secrets as a means of hampering prosecution. As officers of the United States Government sworn to uphold the Constitution and laws of the United States, we deplore this phenomenon as much as do the attorneys in the criminal division of the Justice Department.

Nonetheless, we have a duty to protect intelligence sources and methods from disclosure in the interests of enhancing the national security. In doing so, we frequently become involved in painful differences of opinion with our colleagues in the Justice Department, and the intelligence agencies are often the subject of severe public criticism for allegedly preventing the prosecution of wrongdoers. Obviously, we have a strong interest in graymail legislation that would remove us from an uncomfortable position in which our motives are frequently misunderstood.

The third area of concern has to do with intelligence agency employees. Some of the proponents of graymail legislation seem to view as its principal advantage the notion that it will permit incarcerating a large number of intelligence officers. This is nonsense. As in any large organization, however, occasionally, but fortunately infrequently, an intelligence agency employee will commit a crime, such as misappropriation of Government funds. When such an employee has been engaged in clandestine intelligence activities, it is virtually impossible to prosecute the case without disclosing intelligence source and method information and without the risk that the defendant will contrive some means of dragging further classified information into the case. It is frustrating to the agency's management and to our overwhelming majority of honest and upright employees that the full measure of the law cannot be visited on the occasional miscreant. We would welcome graymail legislation that would solve this problem.

The great advantage of both H.R. 4736 and H.R. 4745 is that these bills would bring about a substantial reduction in the number of difficult, and often unnecessary, confrontations between the interests of criminal law enforcement and the protection of intelligence sources and methods. They would do so by clearly comfirming the power of the courts to employ procedures that will bring a measure of certainty and predictability to the prosecutorial decisionmaking process. The most important feature of the bills is that they create a procedural framework for orderly determination of what sensitive information will be needed to support a prosecution. The essential features of this framework are: prior notification of intended use of classified information; early determinations of whether and in what manner the information at issue may be used in a trial or pretrial proceeding; and interlocutory appeal by the Government of adverse trial court rulings on these issues.

The administration's bill contains a number of provisions, lacking in H.R. 4736, that would remedy troublesome problems which now confront the Government during the course of a "graymail" prosecution. I would like to draw the committee's attention to some of the differences in the two bills to suggest that the committee adopt these provisions of H.R. 4745.

(1) One major difference between H.R. 4736 and the administration's bill, H.R. 4745, is the omission, in H.R. 4736, of the specific "relevant and material" finding that a court must make before classified information can be used at a pretrial or trial proceeding. We would, of course, prefer the stricter language of the administration bill in order to protect classified information from unnecessary disclosure.

(2) A second major difference between H.R. 4736 and H.R. 4745 is that H.R. 4736 omits the section (section 8(c)) which would permit the Government to prove the contents of a classified document without actually introducing the original or a duplicate into evidence. The House version, as reported, addresses this issue with regard only to the pretrial discovery process. I strongly urge this committee to include a section in H.R. 4736 which would extend the protection to the courtroom. Such a section would allow other evidence, such as testimony, to prove the matters for which a document would otherwise be admitted into evidence and, thus, enable the Government to protect classified information in the document from unnecessary disclosure during the trial. This provision could be particularly useful in a case under 18 U.S.C. section 794, involving an unsuccessful attempt to deliver classified documents to an agent of a foreign government.

Where attempted espionage has been nipped in the bud, it would be particularly unfortunate if the Government had to disclose publicly the very information it had prevented the defendant from passing to a foreign power. By relying on testimony to prove that the particular documents involved were related to the national defense, the Government could minimize the damage to the national security that would result from introduction of the documents in evidence. Through testimony, the Government would be able to focus on specific matters of its choice to prove that a given document relates to the national defense, without exposing the entire document at public trial. Classified photographs are a type of documentary evidence for which subsection 8(c) of H.R. 4745 would seem particularly well suited. The defendant would be free, of course, to cross-examine in detail on any matter put into evidence by the Government or to introduce classified information on his own behalf if notice has been given under section 5 and the procedure established by section 6 has been followed.

(3) Section 109(a) of H.R. 4736 allows a court to enter a protective order but does not define the acceptable scope of such an order in statute. In contrast, the analogous section of H.R. 4745 lists seven specific items that may be included in such a protective order. I note, however, that the House Intelligence Committee

has enumerated these items explicitly in the committee report accompanying the bill. While such legislative history is useful, statutory language is more authoritative. Thus, I would urge this committee to include the specific examples in the legislation. Experience in national security-related cases has demonstrated that these items are the most important kinds of protective provisions necessary to preserve the security of intelligence information and that the courts sometimes are in doubt as to whether they have power to impose them. The list is permissive rather than mandatory, but serves a useful purpose in making clear the authority of the courts to order certain protective measures.

(4) I would also urge this committee to include the Jencks Act provision, which is contained in section 10 of the administration's bill, H.R. 4745, as part of your bill.

Additionally I would like briefly to comment on the provisions of H.R. 4736 that I consider particularly important:

Section 102(f) would permit the Government to object during the examination of any witness to a question or line of inquiry that may result in the disclosure of classified information that has not been found previously to be admissible pursuant to the procedure established by section 102. This provision is of great importance in order to prevent the intentional or inadvertent premature disclosure of classified information at trial, by permitting the Government to object and obtain a ruling from the court on the basis of the in camera procedure established by section 102.

Section 109(b), which would allow the Government during the pretrial discovery process to substitute a summary or a statement of facts in lieu of specific items of classified information that the court has ruled the defendant is entitled to discover or inspect, is indispensable. Without it, the remaining protections in the bill can be rendered nugatory by aggressive discovery tactics on the part of defendants.

Section 109(d) empowers the court to order the excision of part or all of the classified information contained in a document to be admitted in evidence. This provision will allow for the protection of classified information not central to the purpose for which the document is to be admitted into evidence. The Government was able to delete some sensitive, classified information from the highly classified manual that was involved in the *Kampiles* espionage prosecution because the defendant gave his consent. Section 109(a) would allow the court to order such deletions over a defendant's objection.

A particularly important feature of the bill, found in section 109(c), provides for documentary evidence to be admitted at trial without change in its classification status. This would permit the Government to introduce a document classified "Secret" as it is, with no requirement for formal declassification or removal of classified markings. In the past, CIA and other entities of the intelligence community have been called upon by the Department of Justice to declassify documents said to be needed to support a prosecution. If such documents are validly classified, however, it makes little sense to call for their declassification simply because they will be used in some fashion at trial. Declassification necessitates a finding that public disclosure will not harm the national security—a finding at odds with an essential element of the crime under many of the espionage laws. Furthermore, the rules on classification do not require that a document be declassified in order to be shown to a limited number of uncleared users, if circumstances make it in the interest of national security to do so. The use at trial of a validly classified document recognizes the reality of a situation in which a national security risk is being taken to achieve a law enforcement purpose that cannot be achieved without some risk. Under section 109(c), it would be left up to the agency involved to determine if a particular document has been so compromised through use at trial as to require formal declassification. If no declassification is called for, such a document would be subject to continued protection under the security procedures called for by section 110.

In closing, I would like to thank the committee for this opportunity to present my views on this important legislation, and to commend the committee for its efforts to find a solution to the legitigate but painful dilemmas that arise when sensitive intelligence information is drawn into the prosecution of criminal cases. I believe H.R. 4736 contains the elements of a sound and equitable solution to the graymail problem, although it could be strengenthed in certain ways. If this legislation is enacted, I am confident that the Director of Central Intelligence, the Intelligence Community, the CIA, and the Department of Justice will be able largely to eliminate the graymail phenomenon and to protect legitimate national security information from unnecessary disclosure. At the same time I

am confident that there will be no infringement on the principles of impartial enforcement of the laws and a fair trial.

Mr. EDWARDS. Thank you.

Ms. Dondy, did you have a statement?

Ms. DONDY. I don't have a prepared statement, Mr. Edwards; but I would like to make a few comments, if I may?

Mr. EDWARDS. Yes.

Ms. DONDY. I would like to associate myself with the statements of both Mr. Heymann and Mr. Clarke.

Enactment of H.R. 4736 as amended, or 4745, will as I know this committee recognizes, and as Mr. Heymann and Mr. Clarke have said, be a significant improvement over the situation that exists today.

Either would create an orderly procedural framework for the nature and extent of disclosures of classified information required in criminal prosecutions involving national security information.

I join Mr. Heymann and Mr. Clarke in their commendations to the committee for its efforts in developing sound and equitable legislative solutions to the graymail problem; and I hope that the committee will be able to expedite early consideration of the proposed legislation.

Thank you.

Mr. EDWARDS. Thank you very much.

Mr. Drinan?

Mr. DRINAN? Thank you, Mr. Chairman.

I want to thank all the witnesses for a very fine presentation.

Mr. Chairman, and counsel, I just ask for clarification:

What is the status of this thing? If the Intelligence Committee moves forward and reports it out, will it become—will it go the floor if we don't act?

Mr. EDWARDS. Counsel?

Ms. LEROY. Joint referral means the Judiciary Committee has independent jurisdiction over the bill.

Mr. DRINAN. Is there a time limitation?

Ms. LEROY. No; there is not.

If you report out a different bill, both committees go to the Rules Committee with both bills.

Mr. DRINAN. Mr. Chairman, I am surprised at Mr. Heymann's presentation and persuaded that we should move this thing forward; and that, frankly, some of the close questions here I am not prepared to answer; and that if the Intelligence Committee can answer them in a way that is satisfactory to the Justice Department, I feel at the moment that we should allow them to do that.

In any event I think it is a good measure. But I have one question about it: Does anybody along the line say that this could advertently or inadvertently create a state secrets law where classified information would in fact be the basis on which a conviction resulted?

Mr. HEYMANN. I am quite sure that the answer is no, Father Drinan; but I might be of more help if you gave me a couple more sentences in terms of what it might do?

I think there's no way in which this moves us in any way toward a law that makes mere revelation of classified information a crime. I think that's correct.

Mr. DRINAN. Well, I just raise the question whether or not—apparently the ACLU has not gotten that in their testimony and Mr. Morton Halperin before the Senate seems to have no objection on behalf of the ACLU.

One additional question: Could this have been done by the usual process by which rules are made for the Federal courts, namely, the Advisory Committee recommends something and that becomes law unless the Congress objects?

Mr. HEYMANN. The answer to that requires sorting out whether there's anything in here that could not properly be a matter of rules.

I am not sure that I can think of anything that couldn't be a matter of rules. The rules process would have been much slower.

Roger Pauley reminds me that a crucial provision could not have been achieved through the rules process, and that is, the right to an interlocutory appeal—and that's very important——

Mr. DRINAN. That's substantive.

Mr. HEYMANN. It would have taken longer, and, as a matter of fact, we think this deserves congressional attention, specific congressional attention; and it has now had a great deal of that.

Mr. DRINAN. Mr. Chairman, I am pleasantly surprised. I find myself in agreement with the General Counsel of CIA [laughter] and apparently they've made a very sensible proposal; and I yield back the balance of my time; and I reserve the balance of my time.

Mr. EDWARDS. They've come a long way, Mr. Drinan. [Laughter.]

Mr. DRINAN. Yuh, either that or we've gone the other way. [Laughter.]

Mr. HYDE. Thank you, Mr. Chairman.

In the event the Government prevails and the trial judge says no, and the defendant appeals to the U.S. Court of Appeals, what provisions for securing this information during review by the U.S. Court of Appeals is there?

That—is that an in camera hearing up there?

Mr. HEYMANN. The documents themselves would be sealed, Mr. Hyde. The bill itself has some provisions in it. Maybe somebody will remind me exactly which ones they are.

Mr. HYDE. Section 104, records of such in camera proceedings shall be sealed and preserved by the court for use in the event of an appeal.

But I am just wondering once you go up on appeal how that is mechanically handled, you know, in a big courtroom; does the bill not provide or should it not provide for an in camera hearing on appeals as well?

Mr. HEYMANN. I do not think—what I am about to say is, I am shooting a little bit from the hip, Mr. Hyde—I don't think there's any problem with closing an appeal. Perhaps there is—do you, Roger, have any thoughts on that?

Mr. PAULEY. Normally documents would not be revealed in the course of appeallate argument; they would be preserved in the clerk's office for use by the judges and clerks.

Mr. HYDE. How are they secured? You've got highly sensitive documents and defendant is arguing they should be released, they should have been introduced, offered, available to introduce in evidence.

You've got three judges, clerks, a court reporter, bailiffs, and all of this—somebody has got to look at that; and before you had one judge in an in camera hearing; that's tight security.

What about on the appeal where a lot more people are going to have access?

Mr. HEYMANN. If I may, Mr. Hyde, let us respond to you quickly in terms of whether there has been a problem there. And it of course has come up in the *Pentagon Papers* case, 12 justices, whatever, 9 justices plus whatever clerks they wanted, had to have access to many volumes of highly classified documents.

It does come up.

Now, I think the best thing would be rather than for me to guess, would be for us to come back to you and tell you if there are problems, and what we think they are.

Mr. HYDE. I just am suggesting—I certainly support the bill—but I would hate to have it tight on the trial end and loose on the appellate end.

Mr. HEYMANN. The major problem seems to be my sitting here without Roger sitting at my arm.

Section 110 of the bill, and my colleague from the CIA alerted me to that earlier, gives the Chief Justice of the United States, after consultation with the Attorney General and the Director of CIA, the power to prescribe housekeeping rules which would apply to the district courts and courts of appeals and the Supreme Court for the handling and protection against unauthorized disclosure of any classified information in their custody.

I think perhaps they anticipated a problem, such as you were concerned about.

Mr. HYDE. I am sorry I didn't anticipate it. Thank you.

Mr. HEYMANN. I am sorry I didn't respond.

Mr. HYDE. Well, I hadn't read the bill.

I have no further questions.

Mr. VOLKMER. I have no questions.

Mr. EDWARDS. Mr. Heymann, how would the law work out in a case like this, where the defendant has in his possession a memo he intends to use at trial. You find out about it. It is not classified.

Can the Government quickly classify it?

Mr. HEYMANN. There is, Mr. Edwards, some information that a person could have that would be highly secret, that would not be classified.

Most of the information would flow from Government classified documents.

If we thought that the piece of paper that the particular defendant had in fact flowed from, was in fact the result of, classified information; if he had been entrusted in some way with it by the Federal Government, we could raise the issue in the way I earlier described by simply saying: We want to know in advance of trial whether anybody means to bring up anything with regard to the names of agents in Africa, in which case he would have to say yes, we mean to bring it up.

And there's the argument about relevance.

But I think that's not quite your question. There it would plainly be covered, because it was classified.

Your question goes more to the fact, what if he simply knows it on his own, didn't get it from the Government; and yet, it's something that we want kept secret; could we classify it at that time in order to keep it secret?

And I think the answer to that is that we could not under the rules of classification, except for atomic energy matters, which have separate rules.

I would like to hear from my colleagues from CIA and DOD. I think we could not simply classify something that an individual had discovered on his own, in that way.

Mr. CLARKE. It would seem to me if we found out that he was going to use a particular memo and information that we believed to be classified, it would be up to us to come in and demonstrate to the court why we believed the information classified. We would adduce certain documents or testimony.

I think at that time it would be up to the court to determine, based on what it hears from the defendant about where he received or obtained the information, to determine whether in fact the information was classified.

I suppose if the court would determine that the information was in fact in the public domain then there would be no way that it could be classified by the Government.

Mr. HEYMANN. And it would have to have initiated with us to be properly classified information. I believe if somebody simply knew a secret because they had themselves happened to blunder on it, and it was not an atomic energy matter, which is separately handled; we couldn't just say, your secret is hereby classified—I don't believe.

Mr. EDWARDS. In recent cases both CIA's and DOJ's position was that public information can't be precensored. What is to prevent you using the same advice here, not you people, but your successors, where you just go to the judge and say, this is public information. You know, it has been printed in Life magazine, or something; but it could be highly prejudicial to the national security and so forth; so we want the rules to go into effect?

Mr. HEYMANN. The only situation I know you could be referring to, Mr. Chairman, is the *Progressive* case; is there something else you have in mind?

Mr. EDWARDS. That case and other cases, too, where information is in the public domain would prevent your filing.

Mr. HEYMANN. I think I will leave that to my friend from CIA.

Mr. CLARKE. Mr. Chairman, I don't think we ever took the position that information in the public domain is classified. We didn't take that position in the *Snepps* case. In that case the issue was whether or not the individual had an obligation under an agreement he signed with the CIA to submit a book in writing for review; and the issue of whether or not there was classified information did not come up in that case.

Mr. EDWARDS. So that is the sole claim there.

Mr. CLARKE. Yes, sir.

Mr. HEYMANN. Solely a contractual claim. He promised not to publish what he had learned.

Mr. EDWARDS. So under this law we don't run any risk at all of someone later on going to the judge, justice going to the judge and

saying, yes, this information is not classified, and opening up a whole new area of regulation under the law that doesn't concern classified information. It's just classified stuff you don't want the public to know about.

Mr. HEYMANN. I think there is no risk that this legislation would in any way facilitate our stopping nonclassified information from being made public, Mr. Edwards. It does not even really facilitate our stopping classified information from being made public, except as it requires that to be resolved pretrial.

I think the answer to your question is there is no way in which this would amount to censorship.

Mr. EDWARDS. Do you think in some instances there is value to the United States in appropriate whistleblowing?

Mr. HEYMANN. Of course.

Mr. EDWARDS. Would this apply to whistleblowing cases?

Mr. HEYMANN. You know, I have promulgated myself a rule which is in the U.S. attorney's manual. It is written there, and it says that we will not prosecute any Government employee on a theory of theft of information if he takes the information to make it available to the public; it is a broad, whistleblowing protection.

But that does not apply, my rule is limited in such a way it does not apply to the national security material. If you do take important national security material and make it available to the public, you are taking such a serious step that we want people to contemplate the possibility of criminal prosecution.

There have not been, with the possible exception of the *Elsberg* case, criminal prosecutions of somebody for making classified information available to the public. There could be done if it were serious enough; but there has not been. That has been the only exception.

Mr. EDWARDS. So the thrust of this law has to do with national security; is that correct, then, not just classified information?

Mr. HEYMANN. By its terms it only covers classified information. It does not change the substantive rules as to what you can do with classified information in any way; it does not intend to. It doesn't change the espionage laws, the Atomic Energy Act; it doesn't change the substantive terms in any way.

All it does is establish a set of procedures so that when national security information is going to come up at trial, it is resolved in advance.

Let me say that in one other way.

It is interesting to recognize, Mr. Edwards, in general there are prohibitions, espionage act prohibitions, against revealing national security information. There it is written in terms of national security information, not classified information.

In general, if you reveal such information, you do it at your peril; and if you do it to a foreign government, we are likely to prosecute you; and if you do it to the press, we may, but we are not too likely to prosecute you if we catch you.

If you think about it, those general statutory prohibitions on revealing national security information could as easily apply in a courtroom as anywhere else; for example, when somebody stands up and he tells a secret. Obviously that doesn't make good sense. So when you

think of it, the broader framework is the prohibitions on telling national security secrets, and I think there have to be such prohibitions.

Next, there is an implicit exception that we all recognize even though it's never been written down anywhere: When you say something in your own defense at trial, having been prosecuted, we are not going to send you to jail. That's the exception to the general rule that when you tell Government secrets, you go to jail; but when you tell it in your own defense, you can go to jail.

Then along comes this bill and it says, it better really be something that has to come out at trial, because if it doesn't really have to come out at trial, you can do just as well without it and it's unnecessary, if you are just throwing it around, you go back to the general rule limiting disclosure, except instead of prosecuting you, the judge will say, you can't bring it into court.

Mr. VOLKMER. Yes; I do have a question, after all.

If we had had the administration bill in effect at the time of the *Berrellez* case, what effect would that have had?

Mr. HEYMANN. I would like to answer in a way that's very careful in terms of revealing any information about the underlying facts or anything like that.

I think we went to the court of appeals and said that if we could have procedures somewhat like those of this bill, we could move ahead, and would move ahead.

The court of appeals said that there's no occasion for mandamus, and left us with the district judge who had said that he wasn't going to create any special procedures, and therefore, we couldn't proceed.

So I think it's fair to say we would have proceeded to trial if we could have had procedures like this.

Mr. VOLKMER. To protect documents that may have been available to the defendant?

Mr. HEYMANN. Would you ask that again, Mr. Volkmer?

Mr. VOLKMER. Protective orders to protect documents that would have been available to defendant, or to prevent documents from being available to the defendant?

Mr. HEYMANN. You mean in that case?

Mr. VOLKMER. Yes, sir; in that case.

Mr. HEYMANN. I think you are taking me back a little bit in terms of time, and I'm not absolutely clear in my memory on it.

I think it was more a question, I am quite sure it's a question of where, with the cooperation of the CIA, we had opened our files broadly to the defendant.

This raises a point that I'd like to call to everyone's attention, including yours, Mr. Edwards: A bill like this allows us to open our files relatively broadly to the defendant. In the *ITT* case, they had had access and they were broadly given access.

The problem then becomes, if we protect their right to a fair trial by giving them, letting them see everything we have when it gets to the trial stage, we need some kind of court order that tells them, you can't now threaten to reveal at trial every secret the Government showed you at pretrial.

I don't think it was a problem of discovery in *ITT*, if I remember right. We needed an order saying that certain matters that we thought were irrelevant would not be brought out at trial by the defendant,

and we couldn't get that type of order; but I am going back in memory a little, Mr. Volkmer.

Mr. VOLKMER. There was information with CIA that they did not wish to be disclosed?

Mr. HEYMANN. That's correct, I think the defense itself had rather complete access to everything, but we didn't want it disclosed publicly.

Mr. VOLKMER. Now, these types of things, the cloak and dagger thing, which that amounted to, are the things that concern me, the fact that some of that information is classified, even—this concerns me. It concerns me that a person is caught up in a case like that and you can't disclose the information. I mean I think the people of this country are entitled to know as much as any other foreign country.

Mr. HEYMANN. Let me respond to what you said.

One thing you said is, look if a person gets caught up in the Defense Department with something and wants to make a complete defense, they have to be able to defend themselves completely.

The bill is so written that the judge has no power to cut off anything under this bill that significantly, or even at all, would affect a fair defense of the defendant. If the defendant wants to bring out anything, if it's the most serious secret in the world, if it's relevant to the defense, and if you can't create a substitute for it by just agreeing to give a summary, the judge is ordered, directed, commanded to tell the Government, produce it, or dismiss.

That defendant walks free.

So as to your first concern, the bill is just written so that there is no substantial right of any defendant that can be in any way compromised by the fact that that right is entangled with secrets.

Mr. VOLKMER. It's the subjective decision of the judge?

Mr. HEYMANN. Well, it's not very subjective. It's subject to appeal.

Mr. VOLKMER. It's subjective, a subjective decision on the judge's part.

Mr. HEYMANN. Subjective?

Mr. VOLKMER. Sure it is.

Mr. HEYMANN. Well, no more so than every other decision. I mean, he makes 100 decisions on what's relevant, what's important, things like that.

Your second question is whether the public ought to know.

It is important, and my own guess is that the public will know far more with a bill like this than otherwise, because trials will reveal information, and cases that we would otherwise dismiss, we will bring because we will be able to know in advance what the cost of bringing them is.

I think in cases like ITT and others, we will know whether we can bring it or not, and the public will get more information because trials reveal information. That's why we have public trials.

Mr. VOLKMER. Thank you, Mr. Chairman.

Mr. LEROY. Mr. Heymann has suggested that there ought to be a different standard by which to determine admissibility of classified information. You suggest a relevant and material standard. Are you precluded now from using that standard in court?

Mr. HEYMANN. No, we are not, and that is why—and I know that CIA said they'd go along with us on this.

I am prepared to leave that to courts in the future. We have not had much success in convincing people. I believe we should let it lie

where it is and make arguments where it seems proper that the relevant and material is correct or not correct.

Ms. LEROY. Has the Department of the CIA ever argued that position?

Mr. HEYMANN. I don't know of any national security case in which that has been brought up. That is a standard that is applied if we are dealing with an informant for the DEA or FBI.

Ms. LEROY. You are talking about the identity of the informant? There is a common law privilege?

Mr. HEYMANN. Privilege; that's correct.

Ms. LEROY. But there is no corresponding state secrets privilege; in fact, courts have rather explicitly held there was not.

Mr. HEYMANN. No; there's not a lot of difference in my mind; there's not a lot of difference between a domestic informant and an overseas source of information to us. They are both informants.

I am not saying that the informant's privilege, as such, covers all national security secrets. I am saying that when you look at, let's say, the history of rule 16 of the Federal rules under discovery, it gives judges power to modify discovery where needed. Then if you look at the legislative history, it refers to informants, national security information.

There's a lot of similarity between national security or State secrets and informant; neither of them should ever go very far in changing a rule that says they are relevant. But the informant rule goes a little distance, and if you asked me what was right, I would say national security should go a little distance.

Again, I don't mean to argue it, because I want the bill to move, and as it is written, coming out of the House Intelligence Committee, it doesn't give us anything on that. I want it to move, so I don't want to ask for more. I think it's right, but I don't want to ask for that.

Ms. LEROY. No further questions; thank you.

Mr. EDWARDS. Mr. Volkmer?

Mr. VOLKMER. If you didn't have this legislation, about how many cases are going to be affected, average, in a year?

Mr. HEYMANN. Relatively few, Mr. Volkmer; we are probably talking in the neighborhood of a half dozen to a dozen cases in a year; but it understates the importance of the matter to talk about numbers, because the cases are national in their importance frequently, and in the attention they command from the public.

The public knows far more about the spies *Enger* and *Chernyayev* in New Jersey, about *Kampiles*, about the *ITT* case.

I don't know whether you went back and read it and looked it up, but you remembered the names of the people in the *ITT* case.

These are major cases with the consequence that the public gets its notion of what's going on in the justice system from these cases.

If it looks like you can't prosecute anybody who has some national secrets, that's important.

Mr. VOLKMER. Well, there's another case up in Indiana, a more recent case?

Mr. HEYMANN. That was *Kampiles*.

Mr. VOLKMER. You did work that out?

Mr. HEYMANN. The situation there is very interesting. Many courts would say that what we are asking you to legislate, Mr. Volk-

mer, they can do now; but as in the *ITT* case, they would say they can't.

Proceeding to do by legislation we are, one, trying to regularize across the board what the court in *Kampiles* plainly felt it could do. The second thing is to encourage judges to be inventive within the bounds of an order to fully protect the defendant's rights.

Mr. VOLKMER. I would just like to ask the gentleman from CIA: If a document has been classified top secret and it has been turned over by a former employee, what-have-you, of the CIA to a foreign government, and that is known, spirited out of the country, gone. The person is found out and criminal charges are brought.

That information then becomes knowledgeable to somebody else. It's still classified, though?

Mr. CLARKE, Yes, sir. We would maintain that it is.

Mr. VOLKMER. Give me the philosophy behind that.

Mr. CLARKE. Well, take the *Kampiles* case as an example, in which the highly classified manual was sold to the Soviets. The fact that the Soviets have the manual does not mean that that information will become known by any other government which may also find the information in the manual of some use.

In other words, the information still, we have to assume, will not be disclosed to others who could use it to harm us.

Mr. VOLKMER. Like who?

Mr. CLARKE. The Chinese.

Mr. VOLKMER. The American people don't know it either?

Mr. CLARKE. Yes, sir; that's true.

Mr. EDWARDS. Mr. Heymann, I am prepared to support the bill. I think it's a good bill.

I think there are a few questions that might come up a little later on. What about some of these—well, addressing the *Cointel* cases of the FBI probe, where there was alleged harassment and people met with Dr. King and so forth; this information is generally classified?

Mr. HEYMANN. As the chairman knows, we have a major FBI prosecution underway, a veritable nightmare of good faith or bad faith graymail problems.

If an FBI official in the future were to engage in the *Cointel* probe type illegal activities, without this bill, it would be difficult to impossible to prosecute.

With this bill, it will be difficult, but perhaps not impossible.

One of the major functions of the bill, and I suspect one of the reasons why the ACLU is so supportive of it, is that it would make it possible to prosecute in that type of situation.

Mr. EDWARDS. What about the United States defending allegations of harassment and violation of constitutional rights and privacy?

Mr. HEYMANN. The bill would still have no effect on a civil trial, Mr. EDWARDS; it only affects the criminal trial.

Ms. LEROY. Have you had the Jencks Act as a problem in a national security case that you are aware of?

Mr. HEYMANN. I can't remember now which one it is; it has not been a major problem.

Mr. Volkmer is right in asking how many cases this will apply to altogether. We're talking about something like 6 to 12 cases a year.

This is not something that's a major wholesale change; it's more a retail change.

Jencks has come up at most in one case. We can handle the Jencks Act problem.

One of them is, we cannot call the witness, and so, in figuring out whether the Jencks Act has come up, we have never succeeded in convincing a court, I believe, to use the provision that we requested here. In asking when the Jencks Act could come up—I mean to be answering—I think we have confronted problems with the Jencks Act in a few cases.

Ms. LEROY. You testified before the Intelligence Committee you didn't have any such cases. If you have any, I would like you to inform the committee at some later point.

Mr. HEYMANN. There is one source of problem that we always have, but we did not intend to deal with that by our present Jencks Act provision.

In a major espionage case, it's a funny sort of problem. In a major espionage case, we have to have witnesses that go on and testify that the document revealed what is relevant to the national defense or was material to the national defense, whatever this espionage statute says.

Frequently the CIA and Department of Defense would like to use the same witness to do a damage assessment of how serious it was that the document got out.

If we are not careful, the damage assessment will be done first, telling all sorts of additional secrets by Mr. Heymann; then we'll call Mr. Heymann as a witness at trial; the defense will ask for his Jencks Act statement; and a whole new set of secrets will be revealed by the Jencks Act statement.

That's a problem we handle simply by making sure that the same person doesn't do the damage assessment as testified.

Ms. LEROY. So there are ways to handle the problem without changing the law?

Mr. HEYMANN. Yes.

I can think of cases where there wouldn't be another way to handle it; but again, Counsel, I am such a bowl of jello on these additional provisions, each of which I think is right, that it's almost hard to get any good fight out of me.

I think the Jencks provision is absolutely right, I think it's right as a matter of principle, but I want to see the bill moved.

Ms. LEROY. One last question: Some people who have been involved in the development of the legislation suggest that to some extent the bill places a burden on the trial judge that more properly belongs to the executive branch. I am thinking of section 105, where the determination has been made that the evidence is admissible, that it's relevant, and the Attorney General objects still to disclosure of the information.

The burden is put on the trial judge to fashion some sort of remedy, whether it's dismissal of a count or whatever.

I guess what my question is, this shifting in the burden of the decision to prosecute, is it constitutionally permissible?

Mr. HEYMANN. As I read 105, Counsel, it does not allow the judge to direct that the prosecution will go forward with the use of the classified information. We would object strongly if it did allow a

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judge to say, yes, that classified information goes in and, yes, you shall continue to prosecute.

As I read 105, or as I read it a little while ago preparing for the hearing, it allows us to dismiss if we want to, it allows us to say, no, the classified information will not go in.

Then it leaves it to the judge to determine the consequence of our refusal to put the classified information in, and that seems to me to be the traditional, correct judicial function.

The judge should not be allowed to order us to produce the classified information publicly, and I hope and think 105 does not allow him to order us to do that; but when we say we will not produce it, it ought to be up to the judge to say what the consequence is for trial. I think 105 leaves that to him.

Ms. LEROY. No further questions.

Mr. EDWARDS. Thank you all very much for your excellent testimony.

[Whereupon, at 11:03 a.m., the hearing was adjourned.]

USE OF CLASSIFIED INFORMATION IN FEDERAL CRIMINAL CASES

TUESDAY, MAY 13, 1980

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 2 p.m., in room 2237 of the Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representative Edwards.

Staff present: Catherine LeRoy, counsel, and Thomas M. Boyd, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

This afternoon the subcommittee continues its consideration of H.R. 4736, the proposed "Classified Information Procedures Act." This legislation has attracted a broad range of support during its progress through the House Intelligence Committee.

Recently we heard from the administration—not only the intelligence agencies, whose responsibility it is to protect our national security secrets, but the Justice Department, who is responsible for prosecuting individuals who may have access to those secrets and who may seek to reveal them in the course of a trial.

The Intelligence Committee is deeply concerned with the need for protecting national security information. The Judiciary Committee, while no less concerned with our national security, also has the special responsibility to safeguard the processes and institutions of the judicial branch and to assure that legislation affecting those processes and institutions does not impinge on rights guaranteed by our Constitution.

We are pleased to have with us today Morton Halperin, the Director for the Center for National Security Studies, testifying on behalf of the center and the American Civil Liberties Union.

With him is Mr. Allan Adler, legislative counsel for the center.

Over on my left is Michael Tigar, a lawyer here in Washington who is defense counsel in the *Humphrey-Truong* espionage case. Both have been involved in the evolution of H.R. 4736, and are very familiar with the bill.

Without objection all of the statements will be made a part of the record, and I welcome all of you gentlemen. I believe, Mr. Halperin, you are going to go first?

STATEMENT BY MORTON H. HALPERIN AND ALLAN ADLER ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE CENTER FOR NATIONAL SECURITY STUDIES

Mr. Chairman, we appreciate the opportunity to appear today before this subcommittee to testify on behalf of the American Civil Liberties Union and the Center for National Security Studies on H.R. 4736, the proposed Classified Information Criminal Trial Procedures Act.

As you may know, we appeared before the Subcommittee on Legislation of the House Permanent Select Committee on Intelligence last August to present our views on H.R. 4736. The concerns we expressed at that time with respect to the bill as introduced have been satisfactorily addressed in the bill as reported by the Permanent Select Committee on Intelligence in March of this year (see H.R. Rept. 96-831, Part 1). Our testimony today, therefore, will briefly summarize our present view of this legislation and the problem it is intended to remedy.

Although we share the Justice Department's expressed dismay over the prosecutions which have been undone by the "graymail" dilemma, we are somewhat skeptical of the view that characterizes the Department as the helpless victim of criminal defendants who are willing to sacrifice national security in order to escape the process by which justice would otherwise be surely and swiftly administered.

The Department asserts that it is forced to abandon certain prosecutions because to fully pursue them would result in the disclosure of classified information and consequent injury to the national security. The Department laments that it faces the risk of such disclosure even though the information in question is irrelevant to the criminal charges presented or would in any event be inadmissible with respect to any defense offered by the defendant. This unfortunate situation arises because federal rules of evidence and criminal procedure as well as common law tradition generally require that the relevance and admissibility of proffered evidence must be argued and decided in open court.

To the extent that the Department's "graymail" frustrations result from this procedural requirement, H.R. 4736 offers a reasonable procedural solution that does not infringe upon the defendant's constitutional fair trial rights. It provides a statutory framework for resolving criminal trial questions of relevance and admissibility with respect to classified information in a manner that assures that such information will not be unnecessarily disclosed when it is irrelevant or inadmissible, nor unfairly denied to the criminal defendant when it is relevant and admissible for the presentation of defense.

The procedure created in H.R. 4736 clearly places a new burden on the defense by requiring the defendant, prior to any trial or pre-trial proceeding, to notify the Government and the court of any intention to disclose or cause disclosure of classified information at such proceeding. It also requires the court to grant the Government's request for an in camera proceeding to resolve questions of relevance and admissibility with respect to such classified information. However, it balances these burdens by providing for reciprocity on the part of the Government with respect to its own evidence and witnesses to be offered in rebuttal if the classified evidence is ruled admissible. It also provides for a "bill of particulars" to be presented to the defendant by the Government upon request, identifying the provision of the indictment of information to which the classified information at issue relates. This latter provision would have proven quite helpful to the defendants in the "Pentagon Papers" prosecution of Daniel Ellsberg and Anthony Russo and in the trial of Ronald Humphrey and David Truong.

Most importantly, the procedure created in H.R. 4736 does not in any way alter the evidentiary standards for relevance and admissibility in deference to the classified status of the evidence at issue. It also prevents the Government from using any explanation of the classified status of the information or evidence to improperly influence the court's determination with respect to relevance and admissibility.

Although the proposed statutory procedure would permit the court, upon the Government's request, to order that the defendant receive only a summary or "a statement admitting the relevant facts" in substitute for specific classified information which is concededly relevant and admissible, it adequately seeks to aviod prejudice to the defendant by authorizing such action only upon the court's finding that the substitution "will provide the defendant with substantially the same ability to make his defense as would disclosure of the specified classified information." Where the court denies a Government request for substitution and the Government files an affidavit objecting to disclosure of the classified information, the

court must order the defendant not to disclose or cause disclosure of the information; however, in such instances, as in instances where the Government simply refuses to deliver admissible evidence to the defendant, the bill requires the court to dismiss the prosecution or provide other appropriate sanctions if "the interests of justice would not be served by dismissal * * *"

As noted at the outset, we are not convinced that the Justice Department's "Graymail" problems are wholly a result of any procedural Catch-22. To the extent that they are not, H.R. 4736 or any other procedural measure will prove unavailing as a solution to "graymail".

We believe that there are other factors which significantly contribute to "graymail". Present policies which allow abuse of the classification system and unquestionably result in overclassification of information lend credence to even the most dubious claim that a defendant possesses "classified information", causing the Justice Department to hesitate in proceeding with any prosecution where a threat of disclosure is made. This is particularly true where the defendant has or had some direct or even indirect relationship with an intelligence component of the Government. Thus overclassification results in constant pressure on the Justice Department from intelligence components of the Government when there is even a remote possibility that classified information could be involved in a prosecution. The unnecessary overabundance of classified information not only allows virtually any defendant who worked for the Government to plausibly threaten disclosure of classified information, it also causes the Justice Department and the intelligence agencies to assume the legitimacy of such claims in order to play it safe.

Since most of the known "graymail" cases have involved government personnel who were either original defendants or were implicated in illegal activities by criminal defendants (i.e., the Helms and Berrellez cases), uneasy political questions arise which cannot be addressed by legislation. Such questions cast a shadow over the fair administration of justice by the Federal government and can only be answered if the Justice Department demonstrates to the American public its resolve to treat all criminal defendants, regardless of their present or past affiliation with the government, as equal before the law and equally subject to the full extent of the criminal process. The reporting requirements in H.R. 4736 will play a significant role in this regard by assuring accountability outside the Executive Branch when prosecutions are dismissed assertedly to prevent disclosure of classified information.

We will be happy to answer any questions.

TESTIMONY OF MORTIN H. HALPERIN, ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE CENTER FOR NATIONAL SECURITY STUDIES, ACCOMPANIED BY ALLAN ADLER, LEGISLATIVE COUNSEL FOR THE CENTER FOR NATIONAL SECURITY STUDIES; AND MICHAEL E. TIGAR, ATTORNEY, TIGAR & BUFFONE, WASHINGTON, D.C.

Mr. HALPERIN. Thank you, Mr. Chairman.

We appreciate the opportunity to appear here on behalf of the Center for National Security Studies, as well as the ACLU.

As you know, we testified on the early version of this bill before the House Intelligence Committee as well as the Senate Judiciary Committee and presented to that committee a number of concerns that we have which we feel were adequately, satisfactorily addressed in the committees' reporting out of that bill.

As you know, Mr. Chairman, our general view is that problems of "graymail," that is, the failure of the executive branch to prosecute, is in large part a matter of political will. We think that they could have gone ahead in prosecutions that have been dropped in the past, and we think they probably should go ahead with prosecutions in the future, even if this bill is not passed.

Nevertheless, we think that the bill will increase the likelihood that prosecutions will go forward against former and present Government

officials who violate citizens' rights, or who commit perjury or otherwise break the law, and who might otherwise be beyond the reach of the criminal law because of the threat of graymail.

What the bill basically does is to establish regularized procedures which, I think, most importantly give the Justice Department and intelligence agencies a sense of confidence that they can have a reasonably good idea before a trial begins what classified information they are likely to have to make public during the course of the trial. This will increase the leverage of the Justice Department. It will be able to insist on going forward with an indictment, with the opening of a trial in order to get those rulings from the court. Then based on the knowledge of what has to be released, the Government can make a decision about whether to go forward or not.

We think it is important that those new procedures not infringe in any way upon the defendant's constitutional rights to a fair trial, and we think the bill does that.

Mr. Tigar suggests there are ways that it might be improved somewhat, but, recognizing that one always has to strike a balance here, we think that the bill does in fact provide adequate protection for the constitutional rights of the defendant.

It does place new burden on them, of reporting in advance of trial what classified information they would have to use. This is balanced by reciprocity on the part of the Government in the requirement for a bill of particulars and a requirement specifying how they will answer that information in the record, and we think these provisions provide an adequate balance.

There also is, I should point out, a separate and independent requirement in the bill for cases in which classified information is involved, where the Government has the burden of proving that information is properly classified and relates to the national defense. In those cases, the Government would have an obligation, independent of the other procedures, to provide a bill of particulars specifying which pages of the document in question it intends to rely on at trial.

I had the pleasure of testifying as an expert witness for David Truong, and was examined by Mr. Tigar. My view is—and I think it is one that he would share—that that provision would have been of significant value to us in knowing what information the Government was going to present, and, therefore, be better able to prepare for trial.

I was also involved in the *Pentagon Papers* prosecution, and there again, the lack of such a requirement and the failure of the judge to order a bill of particulars placed a heavy burden on us in trying to prepare for the trial.

I think it is important to emphasize what the report of the House Intelligence Committee does: The bill does not in any way alter the evidentiary standards for the discovery of information or the admissibility of information because the information is classified.

I think the bill makes clear, and the report underlines, the standards will remain the same, that classified information will be treated as any other information.

As I see this bill, basically what it deals with is the problem that normally when you are talking about information which may or may not be relevant, the problem is simply to keep it from the jury. Therefore, you can have during the trial a hearing outside the presence of

the jury to determine whether it's relevant. but when you are dealing with classified information, the Government's problem is to keep it from being made public, rather than keeping it from the jury.

I think what this bill basically does is to provide a procedure which is fair, which is a full, adversary procedure, but which enables the Government to get a ruling in an orderly way from the court, in camera, without the information being made public, as to whether or not the information is relevant to the issues at the trial. If it's relevant, it has to come in, and the Government still has to dismiss or go forward. If it's not relevant, it's gotten that ruling in a way that does not in any way jeopardize the release of the information.

My view is that this kind of procedure is most relevant in cases involving former Government officials, that its use in espionage cases, that is, an allegation of the transfer of the information, would be very narrow and would not in any material way affect the defendant's rights in such cases.

I think, in summary, that the House Intelligence Committee has done a job which has produced a bill which in most respects conforms to what we would like and I think, on balance, is a satisfactory proposal which I would urge this committee to move forward with.

There was at the last minute some reduction in the reporting requirements in the bill, and I think it would be useful if the committee, in whatever report it issued, if it does issue a report, to made it clear that reporting is an important element, and that the Justice Department remains under an obligation to make clear to the Congress why it is not going forward with prosecutions.

I appreciate the opportunity to testify, and I, of course, would be glad to answer your questions.

Mr. EDWARDS. Thank you, Mr. Halperin.

I believe we'll hear now from Mr. Tigar.

Mr. TIGAR. Mr. Chairman, my views on this bill and its earlier incarnations were contained in testimony which I gave on August 7, 1979, before the Intelligence Committee. I have attached to my prepared testimony a copy of that set of views.

Mr. EDWARDS. Without objection, the entire statement will be made a part of the record.

[The material follows:]

PREPARED STATEMENT BY MICHAEL E. TIGAR, TIGAR & BUFFONE, A PROFESSIONAL CORPORATION

I am attaching a copy of my testimony of August 7, 1979, on H.R. 4736, H.R. 4745, and S. 1482. I continue to adhere to the views expressed in that testimony.

The questions of state secrets and official information were before this committee during the 1973 hearings on the proposed Federal Rules of Evidence. At that time, the Supreme Court had sent over draft Federal Rule of Evidence 509, which had been skewed heavily in favor of the Government by the Nixon Justice Department's intercession in the rule-drafting process. Because the proposed rule brought with it the controversy surrounding the administration's captious invocation of executive privilege in the Watergate context, the Congress quite rightly rejected it.

At the same time, the Congress abandoned all legislative effort to deal with questions of evidentiary privilege in the Federal Rules of Evidence other than in the very general terms of current rule 501, which reads:

"Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common

law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

The rulemaking and legislative activities surrounding proposed Federal Rule of Evidence 509 are summarized in 2 Weinstein and Berger, *Weinstein's Evidence* ¶¶ 509[01], 509[02].

H.R. 4736 if enacted would, of course, be an "Act of Congress" within the meaning of Federal Rule of Evidence 501. In general, I believe it preferable to achieve H.R. 4736's goals by appropriate amendments to the Federal Rules of Evidence on the scope of the evidentiary privilege, Federal Rule of Criminal Procedure 16 on discovery procedures, and 18 U.S.C. § 3731 on the government's right to interlocutory appeal in criminal cases. Treating cases involving national security as sui generis, for no matter what laudable reason, risks enhancing the mystique of secrecy. This mystique has been a powerful and freedom-threatening weapon in the hands of the Nixon and—I regret to say—Carter Justice Departments.

But if there is to be a bill—which appears likely—the following are the problems with H.R. 4736:

1. Substitution, under § 103, of a government-drafted summary for relevant and admissible classified information creates a procedure unlike that followed in any other area of the law of evidence, and vests tremendous discretion in the hands of trial judges, to be exercised upon the basis of ex parte government submissions. This alternative exception is broad enough to threaten swallowing the rule.

2. As I pointed out on August 7, 1979, the § 108 provision for appeal should be hedged about with the same limits now contained in 18 U.S.C. § 3731 with respect to all government appeals.

3. The rulemaking procedures prescribed in § 110 give disproportionate weight to the view of the Attorney General and the CIA, those most interested in secrecy. A preferable alternative would be that employed for all other judicial rulemaking functions—that is, an advisory committee drawn broadly from the bar and reporting to the entire Supreme Court of the United States.

On August 7, 1979, I pointed to some of the positive features of the bill, contrasting it to other legislative proposals then pending. I take it as a good sign that the bill permits invocation of the classified information procedure only for material so designated under appropriate statutory and regulatory provisions. The definition in § 113 would prohibit the government from post-hoc classification markings in an attempt to secure a procedural advantage. As well, the bill imposes upon the government a number of duties that conduce to a fair trial.

GRAYMAIL LEGISLATION

HEARINGS

BEFORE THE

SUBCOMMITTEE ON LEGISLATION

OF THE

PERMANENT

SELECT COMMITTEE ON INTELLIGENCE

HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

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STATEMENT OF MICHAEL TIGAR, ESQ., TIGAR & BUFFONE

Mr. TIGAR. Thank you, Mr. Murphy, Mr. McClory.

I have a prepared statement which I have furnished to the committee, and I will not tax your patience or burden the record by reading it to you.

Mr. MURPHY. Without objection it will be ordered.

Mr. TIGAR. I would like it made a part of the record, thank you very much, Congressman.

[The prepared statement of Michael E. Tigar follows:]

PREPARED STATEMENT BY MICHEL E. TIGAR

I appreciate the opportnuity to appear again before the Committee now that the draft legislation has been prepared. I will not repeat the observations of Morton H. Halperin, with most of which I agree.

I have viewed these bills from the perspective of a trial lawyer and law teacher. As I said in my last appearance here, any legislation on the use of classified information in criminal prosecutions should be both narrowly drawn and integrated with the existing mechanisms for pretrial rulings on evidence and pretrial determination of disputed issues of law. The bitter experience of other nations teachers us that creation of a special body of law for offenses involving the security or secrets of the State tends to foster repression. The example of the Soviet Union comes readily to mind, but the experience of France is perhaps more instructive: the creation of a special tribunal with special procedures for offenses involving the "security of the State" has contributed to distortion of the criminal process. Judge Learned Hand in *United States* v. *Coplon*, 185 F.2d 629 (2d Cir. 1950), warned against invoking the national security as a reason for limiting a defendant's right to contest allegations against him or her.

Moreover, to the extent that the Committee's objectives can be attained by integrating its proposals into the Federal Rules of Criminal Procedure and the Federal Rules of Evidence, the Congress will have ensured that this legislation is subjected to continuing review by the distinguished lawyers and judges who made up the Advisory Committees on the criminal rules and on evidence by the Supreme Court of the United States, and by committees of the Congress. Such continuing review is particularly helpful when one is seeking, as here, to chart new paths and to bring order out of a conflicting body of case law.

What I have said underlies my support for the concept of H.R. 4736, although not for all of its provisions, and my opposition to H.R. 4745 and to the companion bill in the Senate, S. 1482.

I. H.R. 4736

Section 101 provides an orderly means for determining important issues arising in cases involving classified information. This section should, however, be legislated into existence as a part of existing Federal Rule of Criminal Procedure 17.1, dealing with pretrial conferences. The mandatory provisions of § 101 could then be included, but it would be clear that admissions made by the defendant or his attorney could not be used against the defendant unless reduced to writing and signed. Such a provision would encourage free and open discussion of disputed issues.

Section 102 provides a mechanism for pretrial ruling on the admissibility of evidence as to which the government claims some sort of executive or state secret privilege. Such pretrial determinations of relevancy are to be encouraged. It would be fruitless to hope, and the Committee's bill does not seem to envision, that all relevancy determinations can be made pretrial. Unanticipated lines of cross-examination, to give an example that comes readily to mind, may require rulings during trial. But the procedure outlined in § 102 seems, on the whole, to be fair. I would suggest that the Committee incorporate § 102 into the Federal Rules of Evidence. Not only would this provide the continuing review of which I spoke earlier, but it would indicate to trial judges that relevancy determinations involving classified information are no different from those involving any other sort of proffered evidence. It is not, I trust, the intent of this bill to change the rules of evidence on admissibility. If classified information is relevant

to any claim or defense, or is useful in the cross-examination of any government witness, a defendant has an absolute compulsory process and confrontation clause right to use it. (*See generally* P. Westen, *Compulsory Process*, 73 Mich. L.Rev. 71 (1974); P. Westen, *Compulsory Process, II*, 74 Mich.L.Rev. 191 (1975); P. Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567 (1978).) If the government wishes to rely on its privilege against disclosure of such information, the rule under H.R. 4736 continues to be that the government must pay the price in terms of dismissal or an adverse finding as to some issue. Therefore, the procedures outlined in § 102 should be included in Articles 4 and 5 of the Federal Rules of Evidence.

I am concerned about the provisions of § 103. Despite the cautionary language, "that the defendant's right to a fair trial will not be prejudiced thereby," I feel this section may be seen by trial judges as an invitation to restrict the right of cross-examination. Moreover, treating classified information differently from other kinds of evidence enhances the mystique of the classification stamp and therefore inevitably favors the prosecution in a criminal trial. If such restrictions are to be enacted, I would prefer the section to read "the Court shall not grant such a motion of the United States unless it finds that the defendant's right to a fair trial will not be prejudiced thereby." But, as I say, making special rules about classified information runs counter to reason and experience. (*See generally United States* v. *Coplon*, *supra*.) If any procedure that is outlined in § 103 is to be provided, it should be a part of the Federal Rules of Evidence.

Section 104 does provide for preservation of records by the Court instead of by the government and is therefore preferable to alternative versions. Its terms should be incorporated either into Federal Rule of Criminal Procedure 12 or into the Federal Rules of Evidence.

Section 105 enacts what I understand to be existing federal law. However, for clarity, the sanctions for refusal to disclose in a discovery context should be made part of Federal Rule of Criminal Procedure 16, and those relating to refusal to disclose in a trial context should be made part of the Federal Rules of Evidence. Section 105(b)(3) should, in any case, be clarified to express the Committee's intention that the government may not rely upon any part of the testimony of any witness relating to classified information which the government has refused to disclose.

Section 106 is reasonable, but should be incorporated into the Federal Rules of Criminal Procedure.

Section 107 is also reasonable, but should be incorporated into the Federal Rules of Criminal Procedure.

Section 108 provides for an interlocutory appeal by the United States before or during the trial. All such appeals implicate the defendant's right to a speedy trial. A mid-trial appeal also enhances the classified information mystique I referred to earlier. The bill does not provide for expeditious determination of pretrial appeals, and even the time limits on mid-trial appeals risk meeting the same fate as befell the mandatory time limits under 28 U.S.C. § 1826(b), part of the Crime Control and Safe Streets Act of 1970. All this aside, any additional grant of pretrial appeal rights to the United States should be incorporated into the existing terms of 18 U.S.C. § 3731 and be subjected to similar limitations. That is, the Attorney General should certify to the district court not only that the appeal is not taken for purpose of delay and that "the evidence is a substantial proof of a fact material in the proceeding." Pretrial appeals should be given calender preference in the court of appeals. Most important, the provisions of § 3731 on pretrial release should be followed; that is, if the government wants a pretrial appeal with its attendant delays, an incarcerated defendant must be released on bail. Moreover, it might well promote the orderly administration of justice to give both the prosecution and the defense the right to appeal, perhaps subjecting both of them to the certification provisions now applicable to civil appeals of interlocutory orders under 28 U.S.C. § 1292(b).

Section 109 should be incorporated into the Federal Rules of Criminal Procedure and § 109(b) should contain the caveat that no deletion, substitution, or summarization can be done so as to interfere with the due process, confrontation and cross-examination rights of the defendant.

Section 110(a), providing for rule-making by the Supreme Court of the United States, is a far preferable formulation to the H.R. 4745 provision that the Chief Justice alone make the rules. This well expresses my concern that this legislation

minimally disrupt the existing system for determination of disputed questions, and be subject to continuing review in the same way as other federal procedural rules.

Section 111 should be inserted as an additional subsection of Federal Rule of Criminal Procedure 16 or as an additional sentence in Federal Rule of Criminal Procedure 7(f). I am in favor of the no-delegability provisions of § 111.

The definitional section, § 113, should be integrated into the appropriate federal rules.

II. H.R. 4745 AND S. 1482

Perhaps the key to H.R. 4745's defects is in § 3, which concludes "promote a fair and expeditious prosecution," as opposed to "a fair and expeditious trial." These two bills reflect a lack of confidence in lawyers and district judges, provide unusual and unduly complex procedures to achieve their ends and seriously threaten the right of fair trial.

For example, § 6(c)(2) of H.R. 4745 completely ignores the defendant's right to cross-examination on the bias, interest and prior conduct of a government witness and restricts the use of classified information solely to matters relevant to an element of the offense or to a "legally cognizable defense".

Both bills vest rule-making authority in the Chief Justice of the United States. Not only does this provision eliminate any deliberative function the Supreme Court as a whole might be able to contribute, but it bypasses the function typically performed by Advisory Committees appointed by the Court and dispenses with the oversight function of the Congress.

Section 10 of both bills represent an unconstitutional invasion of the defendant's right of cross-examination, and would thrust an intolerable burden on trial judges. As the Supreme Court said in *Dennis* v. *United States*, 384 U.S. 855, 874–75 (1966): "Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate."

This point is well made by Dr. Halperin in his testimony, based on experiences which both of us have had in the Federal courts.

Mr. TIGAR. The committee's deliberations and the hearings that I attended earlier are well reflected in the bill that has been introduced as H.R. 4736, and the bulk of my comments have to do with that bill.

Basically, I have no problems with most of the legislative proposals contained in H.R. 4736. But I would urge upon the committee that all of the provisions with respect to pretrial conferences, rulings on admissibility of evidence and the scheduling of discovery in criminal cases could be legislated into the Federal Rules of Evidence and the Federal Rules of Criminal Procedure rather than made a separate part of title 18 or a separate set of legislation altogether. I urge that on the committee for the following reasons.

Some of these procedures are new and untried. By putting them into the Federal Rules you insure first, that on an annual basis these provisions are reviewed by the distinguished law professors and judges who are a part of the advisory committees on the rules; second, the provisions are subject to review by all the Justices of the Supreme Court of the United States in its deliberative function; and finally, if there are necessary changes to be made, the provisions are subject to review by this House, because this House obviously has to pass on proposed amendments to those rules. That insures not only that this House performs the vital oversight function entrusted to this committee and to the Committee on the Judiciary, but that automatically you have the input from those most immediately concerned with the day-to-day operation of this committee.

For example, section 101 of your bill could as well be an amendment to rule 17.1 of the Federal Rules of Criminal Procedure, and so on.

My concern with your bill begins with section 103. That permits the court to order the substitution for classified information of a statement admitting relevant facts, or the substitution of a summary of specific classified information. I grant you that there is the caveat of finding that the defendant's right to a fair trial would not be prejudiced, but I am concerned, for example, about the problem of cross-examination. Where the Government is conducting an espionage prosecution or any prosecution in which a witness is tendered by the Government who has had access to classified information, much of the impeachment material that a cross-examiner will want to use may be classified. That was certainly the case in *United States* v. *Truong*. We have now discovered, Mr. Murphy and Mr. McClory, by virtue of an admission by the Government in the U.S. Court of Appeals for the Fourth Circuit, that the Government withheld from us Jencks Act material on the Government's principal witness relating to her movements in Paris during a critical time.

No one but an advocate knows how to use information about what precisely a witness did. This was especially true in the *Truong* case, where the transmission of classified information constituted the gist of the alleged offense. I do not say that this withholding of information was intentional, but the CIA was telling the Justice Department that they had everything, and that turned out to be not quite true.

Imagine the situation in which the trial judge is confronted with language like section 103, and the Government, ex parte and in camera according to your bill, urges the court, "After all, this isn't really going to be terriby helpful to the defense, you can furnish them with a summary of the reports the witness filed at a prior time." Imagine the trial judge trying to make that determination basically in ignorance of what the defense strategy is and without the benefit of an advocate's view of the trial. That is my concern with section 103. The rest of the procedures for reviewing these determinations provide ample protection for the Government.

My point is that if the evidence is relevant and admissible, that is, if it meets one of these three standards: It is either in support of the prosecutions theory, in support of the defense theory, or usable for cross-examination or impeachment, then it ought to be turned over. If it doesn't, it needn't be turned over.

I welcome the approach in section 105 with respect to sanctions when the Government refuses to turn over information. A much better job has been done there than in the bill that has been introduced as H.R. 4745 and the Senate bill. I would urge that 105(b)(3) be clarified to express the committee's intention that the Government cannot rely on any part of the testimony of any witness relating to classified information which the Government has refused to disclose. I think it is your intention not to let the Government introduce the direct testimony of the witness, for example, and then not produce usable cross-examination material.

With respect to section 108, this is not the first time this House has confronted the problem of giving the Government a right to interlocutory, pretrial appeal or with the problem of expeditious appeals in

proceedings in criminal cases or ancillary to criminal cases. Most of those legislative efforts, in my experience, have not worked in the way that the House wanted them to work. In the Military Selective Service Act of 1967 you tried to provide docket preference for Selective Service cases and nothing came of it. The courts ignored what both Houses of the Congress said. In 28 U.S.C. 1826, Organized Crime Control and Safe Streets Act of 1970, you provided for docket preference and a 30-day time limit on appeals in contempt matters, where the contempt occurred before a grand jury. The courts of appeals simply ignored this. I know of no case in any court of appeals in which the court said, "We have to get our opinion out in a hurry because the Congress told us to."

I don't know what to do about that. You can't ask the judges to hold themselves in contempt for violating the law, but it raises a problem.

Therefore, I approach these interlocutory appeals warily. If you want to do this, you cause minimal disruption to the system and create a substantial disincentive for the abuse of this power if you make section 108 a part of existing 18 U.S.C. 3731. That section provides for the Government's right of appeal in criminal cases generally. Specifically, and as an example, it provides for interlocutory appeals on search and seizure matters where the judge has suppressed some evidence. If you integrated your procedure into section 3731, you add, first, that the Attorney General would have to certify, as in the pretrial interlocutory appeal on motions to suppress, that the evidence is a substantial proof of a fact material in the proceeding, and that the appeal is not taken for purposes of delay. That would have some disincentive for frivolous appeals.

Second, you don't have a time limit under 108(b)(1) for an appellate decision on a pretrial appeal. You just provide the appeal has to be taken within 10 days. Now, section 3731 requires that a defendant be released on bail when the Government takes a pretrial appeal after a motion to suppress. All constitutional speedy trial, and serious Speedy Trial Act problems aside, the quid pro quo has to be that if the Government wants a pretrial appeal on one of these issues, it has to let the defendant out on bail because it is not fair to have an incarcerated defendant while the Government exercises rights of appeal.

Espionage is perhaps the most serious crime to which this bill would apply. This will raise the issue of an espionage defendant being out on bail. Justice Brennan, in releasing David Truong, pointed out the constitutional standards there. I think you will find in a review of history that espionage defendants tend to make fairly good bail risks as a matter of fact, for all sorts of reasons. Sometimes in Soviet cases it is because their Government guarantees that they are going to be there, and their Government doesn't want to provoke an international incident. In other cases, the watchfulness of the FBI it seems to me is going to be your guarantee.

I am left then with 108(b)(2) which provides for an interlocutory appeal during the trial. I don't know what one does if the court of appeals simply doesn't decide within 4 days of the argument, and a jury is waiting to hear further evidence. Although this is not in my prepared statement, one might provide that if the court of appeals

hasn't decided within the 4 days, the trial judge's order shall be final as against the Government and the trial must proceed. Serious constitutional questions are raised by interrupting a jury trial at all, as well as serious speedy trial questions if these delays become too cumbersome. I would hate to see a delicately worked out mechanism falter because the courts of appeals, as they historically have, don't do what they should.

Section 110(a), regarding the Supreme Court's rulemaking authority with respect to protection of documents, is far, far preferable to the H.R. 4745 procedure and the Senate bill procedure that have the Chief Justice of the United States making rules. The Supreme Court itself is an unrepresentative institution. The Chief Justice at any particular time may be of one political persuasion or another, and the committee has done well in making the provision of the rules subject to the same process that applies to the civil rules, criminal rules, and rules of evidence. In those instances the Supreme Court, as a deliberative body with advisory committees, makes the determination. The history of those rules and their operation and practice has shown the wisdom of providing the full Court with input from the legal profession.

Mr. Chairman, members of the committee, H.R. 4745 is a bad bill. I regret very much to say that I can't find anything good to say about it except where its language happens to track the language of H.R. 4736. H.R. 4736 at least reflects a trial lawyer's judgment and the hearings that have been held here and is based on the finest traditions of the deliberative function of the Congress. H.R. 4745 is the Justice Department's bill and it reflects Justice Department bias. For example, under section 4(a)(iv) of H.R. 4745, a protective order can require security clearances for persons having a need to examine information, which gives the court control over who is going to participate in the defense of a criminal case.

Now, I know that has been done. Some lawyers have been willing to go through the clearance process as a predicate to their representing a client and have had the members of their defense team go through the clearance process. I think that interferes with the defendant's right to counsel of his or her choice.

Section 6(c)(2) provides that unless the court makes a specific written determination that the information is relevant and material to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence, the information may not be disclosed or elicited at a pretrial or trial proceeding. That is the standard.

Mr. Chairman, that is unconstitutional. Any Supreme Court you want to choose would invalidate that in a smooth running minute, and I mean from the time of John Marshall down to this good day. It ignores the fact that information which isn't relevant to an element of the offense or to a specifically cognizable defense may nonetheless be producible by the Government and usable in cross-examination of a witness for bias or prejudice.

Mr. McCLORY. I thought we had testimony earlier that in the rape case we amended the law with regard to the manner of proof and limited the defendants with regard to——

Mr. TIGAR. Unchastity.

Mr. McCLORY. Evidence against the victim, that we were able to modify by statute the rules of evidence, and that, consequently, we could do the same thing here by adding the word "material" as well as relevant and material.

Are we talking about the same thing?

Mr. TIGAR. Congressman McClory, we are talking about the same kind of issue. Let me try to say what I perceive to be the distinction between those two cases.

Historically, the defendant's right to cross-examine the prosecutrix as to prior acts of unchastity in cases involving unconsented sexual contact has been one of those mutants or spores in the law. Prior unchastity is not, strictly speaking, relevant to the question of whether on a particular occasion defendant forced his attentions on the prosecutrix. The legislation with respect to that subject, therefore, is a kind of codification of an "other crimes" or "reputation" question.

Mr. McCLORY. You don't think it is a valid analogy then.

Mr. TIGAR. No, I don't. What we are speaking of here is the question, for example, of whether or not a Government witness has on a prior occasion deliberately falsified records or testimony with respect to the conduct of somebody else. Now, that prior instance of falsehood may have involved some covert mission on which the witness was engaged, but that prior willingness to put aside regard for the truth in favor of doing what one's Government says is the sort of relevant information which the Supreme Court has said you have a constitutional right to make inquiry into.

Mr. McCLORY. Well, when I read Mr. Heymann's statement that he delivered before the committee, I questioned whether or not we had the right to add words into a statute which would change the measure of proof, and yet he spoke very convincingly in support of it.

But you question, I mean, you just think the Supreme Court would throw that out as unconstitutional.

Mr. TIGAR. The leading cases on the defendant's right to disclosure of information relating to a witness's propensity to tell the truth, and a witness's bias and prior record were authored by Chief Justice Burger himself.

Mr. McCLORY. So you think we should just omit the words "and material"?

Mr. TIGAR. I don't think you should pass H.R. 4745 at all, to be frank.

Mr. McCLORY. But on the precise point to which you are addressing yourself, your statement is that adding the words "and material" makes the law unconstitutional, at least that part of it.

Mr. TIGAR. No. Information may be immaterial to an element of the offense or a legalliy cognizable defense, but still relevant to the bias or prejudice of a witness under cross-examination. You would have to add words to that effect.

I cite in my statement Peter Westen's article in Harvard Law Review, "Confrontation and Compulsory Process" and his two prior articles on compulsory process. I don't mean to get everybody reading Law Review articles, but Professor Westen has done an admirable job of summarizing the law in those articles as well as arguing his position. Maybe this Harvard article was published after Mr. Heymann left

Harvard and came to Washington, so it didn't come across his desk. But it takes a position that is very different from what he took before this committee.

This is by no means an exhaustive list, but both the Senate bill and H.R. 4745 amend the Jencks Act. Mr. Halperin was here this morning and recounted in his prepared testimony some reasons why that is unsatisfactory. That recounting was based on conversations that he and I and some other lawyers have been having over the last several months as we have been thinking about these problems in an effort to be useful to the committee if called upon, so I won't repeat it.

The cross-examination of Government witnesses is not only a defendant's sacred right, it is the most important part of a criminal trial as far as I am concerned, and limiting the Jencks Act in this way essentially imposes the trial judge's tactical judgment on the advocate's tactical judgment. After all, a trial is not strictly a rational process in which you count up a bunch of facts. The demeanor of the witness, as the witness is being taken through even prior consistent statements, may be relevant to the jury's determination. Little changes in wording and nuance between the witness's prior consistent statement and what the witness says on the stand may be relevant in the hands of a skillful advocate.

That, it seems to me, is why this section is unwise, and may raise some constitutional problems to the extent that one regards the Jencks Act as based on the *Jencks* decision, which has a constitutional as well as Federal supervisory power footing.

That is the extent of what I came prepared to say. I would be pleased to answer any questions that the members of the committee might have.

Mr. MURPHY. Mr. Tigar, sections 8(b) and 8(c) of the administration bill would allow the court to waive, when classified information is involved, the "Rule of Completeness," rule 106, and the "Best Evidence Rule," rule 1002.

Could you describe the practical operation of these rules and comment on the administration's proposal to change them?

Mr. TIGAR. Yes. The first thing that this does, Mr. Chairman, is to perpetuate the mystique of the classification stamp. One has a hard enough time in a criminal case when ordinary citizens see that classification stamp and don't realize everybody in Government who is anybody has got one. That is the first problem.

Let me turn to the second problem. I am not saying that I don't trust my Government, but the kinds of cases in which you are likely to need these procedures are precisely the ones in which there is great temptation for the Government counsel, as well as defense counsel, I suppose to overreach because of the importance of the issues. That is why any departure from a sort of common law adversary process bothers me. The rule of completeness is a part of the adversary process. It lets opposing counsel insist that a misleading impression not be created. Particularly 8(b) seems to involve an in camera determination so that opposing counsel may not even see what has been deleted. You don't even have the in camera protection of the adversary process.

With respect to the waiver of the best evidence rule, Mr. Chairman, I assume you are familiar with that old saw which states there are no

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degrees of secondary evidence. This means that you could have a witness get up and tell you what was in the document, or photograph, and then you would try to cross-examine that witness about the contents of this document or photograph and thereby try to establish what was in it.

Imagine, Mr. Chairman, if we were to take H.R. 4745, and tear it up. Throw it away. There are no originals, no xeroxes, and we were to get Congressman Rodino in here, and you were to conduct his direct examination of what is in the bill and I was to cross-examine him. It would be like three blind men trying to tell you what an elephant looks like. I don't think any of us in this room would have a very good idea of what was in there by the time we were done.

That is the practical problem with that. And if you assume that the Government witness on direct examination who is telling you what is in the photograph or who is providing the information has a motive to kind of twist the facts because he works for the Government, or to color his testimony in a particular way, the problems are enhanced.

Mr. MURPHY. Both bills authorize the court, once it has found evidence containing classified information to be admissible, to require deletions or summaries upon Government request if it finds that the defendant's right to a fair trial will not be prejudiced. You indicated opposition to these provisions in your statement. Doesn't the comment "if a defendant's right to a fair trial will not be prejudiced" sufficiently protect the defense interest?

Mr. TIGAR. First, Mr. Chairman, I don"t believe so because I am opposed in principle to treating classified information differently from all the other kinds of information that come into evidence in a trial, such as priest-penitent privilege information, lawyer-client privilege information, or trade secret information which may involve millions and millions of dollars. If it is relevant and material to an element of the offense or to a defense or for cross-examination purposes, then it should be turned over. If it is not, it shouldn't. And the principles shouldn't be any different for classified information. I see no principled ground on which to do that.

Second, once again, you are asking the court ex parte and in camera to summarize information which is going to be used by an advocate, and over and over and over again I think we have found that trial judges simply can't perform that function. Trial judges can't put themselves in the shoes of the advocate in a way that is going to be fair to a defendant.

This isn't simply my view. The Supreme Court said this in *Dennis* v. *United States*, at 384 U.S. 855 at pages 875 and 876. A number of trial judges have said this with respect to requests that they review grand jury testimony and pick out what would be useful for cross-examination.

The collective experience of lawyers and trial judges and people that work with this should warn us against any such thing.

At the very least, it seems that if you are going to have such a procedure—and as I say, I am unalterably opposed to it—that you should change the language as I have indicated to say that the motion shall not be granted unless the court finds the defendant's right to a fair trial will not be prejudiced thereby. That, coupled with the right to

have a hearing, would mitigate the rigors of this section, and would put the burden of proof where it belongs. That is, if you are going to meddle with established rules, then the burden ought to be with the people that want to meddle with it to establish their case.

Mr. MURPHY. Mr. McClory?

Mr. MCCLORY. I certainly can't accept your thesis that national security, classified, secret information relating to the whole survival of the Nation can be placed in the same category with privileged information or privileged statements such as communication between doctor and patient, lawyer and client and so on as you just now indicated. It seems to me that there is a very sharp distinction, and a much higher importance must be given to classified information which impinges upon our national security.

Consequently, I think that to try to amend the rules of court or to embody in the rules that which has been held in court cases would be entirely unsatisfactory as far as the objectives of the work of this committee and the objectives of the Justice Department, and for that matter, the objectives of defendants' interests, as expressed by Mr. Halperin, of the ACLU, are concerned.

Mr. TIGAR. Congressman McClory, the committee can change the rules of evidence and the rules of criminal procedure in any way it wants. The mechanism I propose for whatever change you do make doesn't have anything to do with the contents of the rules.

Mr. MCCLORY. We don't change the rules. The rules of court are not established by the committee and by the Congress. We sometimes give legislative sanction to rules of court, but we now don't modify rules of court by statutory enactment.

Mr. TIGAR. You have the present statutory power, I believe, to enact amendments to the rules if you decide to do so. The usual procedure is that you simply approve or disapprove them, but I can think within the last 2 years of several modifications that you have made to the rules of evidence and the rules of criminal procedure by legislative action.

But I think it is true, and I say this with great respect, that we do disagree, but not to the extent, perhaps, that your interpretation of my remarks might have suggested.

Yes, national security concerns are more important than lawyer-client concerns. The Latin maxim is *salus reipublicae suprema lex*, which means the safety of the public is the supreme law. That admonition was quoted by Learned Hand, a staunch defender of the national security. In 1950, he wrote that where the rights of a defendant are concerned, this supreme principle must yield, and indeed, in the *Coplon* case he said that it is the test of whether a government is democratic or not. If at the moment the government is going to prosecute one of its citizens it is unwilling to take the wraps off whatever secrets may be relevant to the elements of the offense, or to a defense, or to a procedural protection such as the disclosure of wiretapping, or to cross-examination, that the government is not democratic. I cite the *Coplon* case in my testimony. I think I cited it last time. It is a wise and penetrating discussion. It has been cited with approval by the Supreme Court, and nobody has ever done better than that at setting out the relevant considerations.

So in sum, if we have on the one hand this important national security interest, and if we have on the other hand these irrefragable rights of a criminal defendant, the question isn't so much, "How are we going to stack them up?" The question is: "Procedurally, how do we reach an accommodation?"

I think 4736 tries to do that, and the reason I suggest that we treat this accommodation in the same way that we treat lawyer-client privilege questions is I want to give trial judges confidence and lawyers confidence to work and make these procedures work. I want to suggest analogies to them, as well as not creating a sort of mystique of the classification stamp.

Mr. McCLORY. Well, I am encouraged by your support of H.R. 4736, and I was merely questioning your oral statement that you question the need for either one of the bills, as I interpret it. I would merely point out that there is a strong demand for some legislation. There is a general recognition that some prosecutions have been aborted by a defendant's claim that only by revealing classified information at a public trial could he put forth a defense, and consequently the problem is presented legislatively to find a solution to protecting the national security interests and at the same time prosecuting wrongdoers, whether they happen to have been former CIA agents or not.

Mr. TIGAR. To the extent that these bills attempt to establish procedures to make sure that prosecution decisions are made on the merits as opposed to for other reasons, they have merit. My suggestion that you integrate the procedures with the Federal rules is not designed to deprecate the importance of the bills. It is designed to say that I have confidence in the ability of trial judges and the legal profession and the Supreme Court, as well as this House, to work these procedures out and to suggest needed changes. That really is the purpose of what I was saying.

Mr. McCLORY. Do you feel that existing discovery procedures are adequate to a plaintiff or defendant to determine the scope and extent of classified information which might be required either in the prosecution or the defense?

Mr. TIGAR. Absolutely not, Mr. McClory. I think that by and large the courts have done fairly well in protecting the Government's interests. Judges as a matter of course hold a pretrial conference and issue all sorts of protective orders about how you can't use the information. One of the positive features of 4736 is that it imposes a discovery obligation on the Government in classified information cases. That protects the rights of defendants to an extent that some trial judges have simply been unwilling to do because they didn't think they had the authority to do it. I welcome those provisions.

It also insures that the classified information doesn't sit back there like a landmine ready to blow up the prosecution midway through because some bureaucrat somewhere decided to protect the prosecuting attorney from knowing something that he should have known. By putting that discovery obligation on the Government early, you are going to make sure that the prosecutor goes around to the agencies to see what is there and that he doesn't get sandbagged by his own purported friends.

Mr. McCLORY. I don't think you touched upon this, and maybe it is not an area that you are particularly interested in, but what about the

provision in H.R. 4736 for reporting nonprosecution of cases to the committees of the House and Senate intelligence committees?

Mr. TIGAR. I favor that provision, Congressman McClory. It seems to me that in this field perhaps more than any other, the need for some control first by administrative regulation and second by the oversight function of this House over the enormous discretion that the Justice Department otherwise possesses is terribly important. Depending on what administration it is, a refusal to prosecute may be protecting some big multinational corporation against its misdeeds, may be protecting somebody that overthrew a foreign government, and may be protecting a spy. It may be protecting a leaker that some department head doesn't want to see brought to light. That is why I favor the procedure that you have written in.

Mr. MCCLORY. One more question, if I may, Mr. Chairman, and that is when the defendant raises the issue that he has to use classified information in order to properly present his defense, what do you think about the right of the judge, in the in camera proceeding, not only deciding whether or not that testimony or that evidence might be relevant or relevant and material, but likewise, to determine whether or not it was appropriately classified? Should the judge be authorized to determine whether or not it has been properly classified?

In one bill, I think it is H.R. 4736, we provide that the Attorney General will make that decision, and that's it. H.R. 4745, which you have criticized, leaves that issue up to the judge to decide.

Mr. TIGAR. I think that is irrelevant, Mr. McClory, because as I understand 4736, if the evidence is relevant and admissible it was properly classified.

Mr. MCCLORY. In camera.

Mr. TIGAR. Well, if it is relevant, the defendant can use it. If it is not relevant, he can't use it. That is the determination the trial judge makes. I don't think the trial judge needs to concern himself with the question of whether or not it was properly classified in making that ruling on evidence.

So I don't have any problem with the formulation in 4736. The Attorney General's certification there is simply a stepping stone to get the judge to make a pretrial relevancy determination.

Mr. MCCLORY. Thank you.

Thank you, Mr. Chairman.

Mr. MURPHY. Thank you, Mr. McClory.

Mr. Tigar, one question. What about applying the statute to offenses that may have occurred in the recent past where the Justice Department is considering bringing action and we pass the statute. When do you think the applicability of the statute should apply?

Mr. TIGAR. I think the statute should apply to all pending cases and all alleged offenses whenever committed if the prosecutions are hereafter brought. There is a presumption that procedural legislation applies retroactively and that substantive legislation applies prospectively. That is a canon of statutory construction, and the fate of adjustments of the statute of limitations, for example, in the criminal code, so as to apply to offenses to which the statute has not yet run indicates that retroactive application wouldn't face any constitutional hurdles in the court.

I must say that if a bill were passed with which I agreed and I were going to represent somebody, I would ask that these procedures be applied, at least the part of them that makes the Government have to tell me things.

Mr. McCLORY. May I ask a question?

Mr. MURPHY. Sure.

Mr. McCLORY. Do you feel that either one of these bills or both of these bills are more beneficial to the prosecution or the defendants?

Mr. TIGER. 4745 is probably a more pro-prosecution bill. It is conceived as such. However, I would venture to say that the cumbersomeness of the procedures that it establishes, and the multipart analysis that somebody inside the Justice Department has come with pose serious problems for both the prosecution and the defense. The more complex you make things in an effort to cover all possible contingencies, the more things slip through the cracks. I think 4736 is sort of a lawyer's bill.

Mr. McCLORY. If we would choose to make the statute applicable only prospectively, you don't question we could do that?

Mr. TIGAR. I have no question that you could do that as well. Of course, a trial judge already, under Federal Rule of Criminal Procedure 17.1, could take a look at this bill and say, well, it doesn't really apply, but I am going to issue a pretrial order that has got everything in 4736 in it, except, of course, the Government's right of appeal, and impose those procedures.

I suspect, as a matter of fact, that you would find a lot of trial judges doing that simply because they don't want to make a misstep in handling cases that are as important as these kinds of cases.

Mr. McCLORY. With respect to the interlocutory appeal, you only oppose the interlocutory appeal authority with respect to decisions that are made during trial. Pretrial you have no problem there?

Mr. TIGAR. I have no problem with that provided it is made a part of 3731, which requires that the defendant be released. I think you have serious speedy trial act problems having an incarcerated defendant sitting around cooling his or her heels while the Government winds its way up to the Court of Appeals.

Mr. McCLORY. Thank you, Mr. Chairman.

Mr. MURPHY. Mr. O'Neil.

Mr. O'NEIL. Mr. Tigar, H.R. 4745 proposes a standard of relevance to which you have earlier referred, at section 6(c)(2).

Mr. TIGAR. Yes, sir.

Mr. O'NEIL. And the Government has described that section as applying the standard explicated in the *Roviaro* case. They have also said that even if 4736 were to become law, they would argue that a *Roviaro*-type standard ought to be applied in these kinds of situations, that is to say, that the Government ought to have at least as much protection for classified information as the courts have given a Government informant.

Would you comment on that? I mean, their contention is that this standard would arguably apply even today.

Mr. TIGAR. I see. That is crackpot. With all due respect to the Department of Justice, that really is lunacy. The *Roviaro* case deals with the question of when the Government must reveal the name of

an informant who is not a witness at the trial, and the Court held that, in a decision that has spawned as much appellate litigation as any decision of the Supreme Court that I know about, the disclosure must be made at least if the informer was a witness to the offense itself.

Roviaro has nothing to do with the admissibility in evidence of a particular document or other item of evidence, or the testimony of a witness at trial. At trial, if a witness is proffered by the Government, that witness may be cross-examined not only as to an element of the offense or a legally cognizable defense. That witness may be cross-examined as to motive to falsify, bias, prejudice, prior inconsistent statements, any deal that the witness has made with the Government and so on. Those standards are explicated in cases that are relevant to that question, of which *Roviaro* doesn't really happen to be one, such as *United States* v. *Giglio*, *Davis* v. *Alaska*, and *Brady* v. *Maryland*. Those cases, decided by the current Supreme Court, have to do with the standard of what is admissible in evidence.

So to the extent that *Roviaro* is being relied upon as a blanket standard for introduction of evidence, that is simply wrong.

You could have a *Roviaro* standard with respect to the disclosure of an informant whose identity or activities may be classified, but that doesn't have anything to do with disclosing or eliciting at a trial proceeding.

Mr. O'NEIL. And one other thing. The two bills also differ, and Mr. McClory has alluded to this several times, at the point at which the trial court sees either, in the case of 4736, an affidavit or certification from the Attorney General as to the classification of material or in the case of 4745, an explanation, a written explanation of what is classified and why it is sensitive. They differ in when the trial court sees this. In 4736 it is provided after the judge makes any determination of relevance, use or admissibility. In 4745 it is provided contemporaneous with any request the Government has for deliberation by the judge on those issues of admissibility, relevance, et cetera.

What is your opinion concerning the two approaches?

Mr. TIGAR. In every case involving the potential use of classified information, a pretrial conference is a good idea and there is no constitutional problem with having it in camera. A judge doesn't need an affidavit early on about why the material is classified or what importance it has. The fact is that the information is classified and somebody cares about setting these questions and so a conference should be held.

In 4736, the affidavit applies only in a specific, limited situation where the judge has ruled on admissibility and where the Government wants to substitute a summary or a stipulation. I am opposed to any such substitution procedure, but at least if you are going to have one, the inclusion in 4736 of the affidavit provision makes the providing of that affidavit a kind of hurdle that the Government has to jump over, and to that extent fulfills some function that is relevant to the trial process.

I don't really see why there is an affidavit procedure in 4745. It seems to me that somebody began to write a bill about why things are classified, and then someplace in the halls of the Justice Department it collided with a bill about pretrial procedures, and this is what happened.

Mr. O'NEIL. Well, the Government contends that it would be helpful to them and to the courts, more often to the court, if the court were fully apprised of all the circumstances of the matter at issue when it goes to determine such matters as whether or not a substitution is appropriate, or a stipulation. If it realizes that the only thing at issue is whether or not, say, the name of an agent, of an intelligence agent will be included in what is provided to defendant, then the court can very easily make that kind of determination, and therefore all these matters ought to all be thrown together, whereas the approach of 4736 is that the judge doesn't see any certification until he actually determines beforehand whether it is relevant or admissible.

Mr. TIGAR. Sure. Well, the only purpose of the affidavit in 4745 is to scare the hell out of the district judge and to make him or her think that the information is so important that if she or he makes a misstep on the defendant's side as opposed to the prosecution's side irreparable damage will be caused to the country.

I don't mean to be uncharitable in ascribing motives to the authors of the bill, but I really don't see any other purpose for putting the affidavit provision in section 6(b) of 4745.

Mr. MURPHY. Ira?

Mr. GOLDMAN. I wanted to clarify one thing in talking about the Roviaro standard "relevant and helpful," or relevant and material." At one point a little earlier you made a flat statement that if professed evidence is "relevant material," it must be released to the defendant. If it is not, it doesn't have to be.

Now, did you mean "relevant and material" or did you mean just "relevant"?

Mr. TIGAR. No; I meant "relevant and material" because I don't have any problem with the use of both of those standards as I believe them to be defined by the text writers. Professor Morgan at Harvard used to say that material meant having some relationship to the case, and relevant meant tending to prove a particular proposition in the case. I don't really understand that distinction, but you can use both words if you want. It doesn't bother me.

The language I have trouble with is what followed: "Relevant and material to an element of the offense or a legally cognizable defense." Information can be relevant and material and therefore admissible under the Federal Rules of Evidence which says that, prima facie, all relevant evidence is admissible, without being relevant to an element of the offense or to a legally cognizable defense. It can be relevant to the state of mind of the witness. It could be relevant to the witness's bias, relevant to prejudice, relevant to some deal he or she made with the Government, and so on. These are examples of considerations I mentioned before.

Mr. GOLDMAN. You obviously are aware of the background of the rape evidence rule and as to why there was a call for setting up such a rule.

Do you feel that that is intended to protect the victim, or is it prejudice to the fact-finding function of the trial?

Mr. TIGAR. Prejudice means prejudice to either side of the lawsuit not to the witness. There is no privilege against being asked embarrassing questions. Professor Greenleaf so suggested in a treatise in 1870, but the suggestion died without anybody ever seconding it.

The prejudice here is prejudice to the prosecution, that is, asking the prosecutrix about prior unchastity simply inflames the jury against her, and therefore against the prosecution and that prejudicial effect outweighs any relevance that the evidence is thought to have.

Mr. GOLDMAN. Trying to keep the rules as much as they are now, rather than changing them unless there is a good case for it, and looking at the requirement in 4736 that a bill of particulars be supplied to a defendant automatically, unrequested, do you feel that that requirement is necessary; that if a case involved classified information, it necessarily calls on the Government to provide a bill of particulars?

Mr. TIGAR. Yes, I do, for two reasons. First, because it is a quid pro quo. You are requiring the defendant to come forward and give notice of an intention to use classified information, similar to the alibi defense rule applied against defendants. In the alibi defense notice statute, Rule 12.2 of the Federal Rules of Criminal Procedure, there is a quid pro quo. The Government has to come back and say what they are going to use to rebut it.

Mr. GOLDMAN. Well, this bill would require that also, so a bill of particulars in addition to the information that is going to be used to rebut the testimony is necessary?

Mr. TIGAR. That's right.

Mr. GOLDMAN. I mean, it apparently goes farther than the alibi notice rule.

Mr. TIGAR. Let me go on because, of course, the alibi notice rule bill of particulars doesn't really matter provided they provide the information.

The bill of particulars serves a second function, which is to help both sides anticipate the need for rulings on classified information. The bill of particulars circumscribes the Government's proof. It makes sure that the prosecution can't spring unexpectedly. To the extent it provides a road map, it is helpful.

I would have thought that the language was unnecessary when in 1966 Federal Rule of Criminal Procedure 7(f) was amended to change the word "may" to the word "shall" with respect to the provision of bills of particulars generally. Unfortunately that change seems to have escaped the notice of a great many sitting district judges. So I think it is a good idea to remind them of it.

Mr. GOLDMAN. Do you feel that a court can issue a protective order that prevents an attorney from discussing with his client certain matters disclosed to him?

Mr. TIGAR. Absolutely not.

Mr. GOLDMAN. Even if the information doesn't relate to a defense to the charges but rather just to impeachment? Here I am thinking of an alternative to the Justice Department's proposal in the Jencks Act. I understand where through discovery the defense counsel obtains information that it might be necessary to discuss it with a client in order to prepare the defense as to what actually took place, but if it is just for impeachment, is it necessary to have the client take part in discussing that sensitive material?

Mr. TIGAR. Of course it is, and I think that the effective assistance cirle was recognized as far back as the *Scottsboro* case, *Powell* v. *Alabama*, where counsel were not given sufficient access to the defendants to be able to prepare. That is the constitutional side.

The practical side is this: I can't try a case in which somebody's liberty is at stake in which I am called upon to cross-examine a witness with whom the defendant has been intimately involved. I don't mean in a carnal way, I just mean that they know each other real well, and there is a dispute about what was done and what was said, and I can't cross-examine that witness without the active help of the defendant at every stage. Unfortunately what you are going to have in a number of these national security cases, because of their nature, is a lot of one-on-one cases, where it is the defendant's version against somebody else's version as to just how things got to where they were.

Mr. GOLDMAN. One final question. The Government has one problem in espionage cases apparently where one document of, let's say 200 pages, is transmitted to a foreign power, and the Government would like to only put before the jury a portion of that document. Now, one possibility is to only charge the defendant with transmittal of 10 pages of the document. You criticized the Justice Department proposal which would allow only admission into evidence of part of the given document. Do you think that charging the defendant only with transmittal of part would be a solution, or do you think under the existing rules of relevance and completeness that the Government would be able to only have admitted part of a classified document for admission to the jury?

Mr. TIGAR. I would welcome any procedure that would identify the specific information that the Government thought harmed the national security. I welcome specificity. I am opposed to interfering with the rule of completeness which essentially says to the trial judge, "Look, if it is fair to let the whole thing in, then let the whole thing in." I don't see why you ought to interfere with the discretion of trial judges in that regard.

I could easily see a case in which the Government would charge a person with having transmitted only 10 pages when in fact the whole document was transmitted, in which the introduction of the rest of the document could materially weaken the Government's contention that the national security had been harmed. It is possible to take some language out of context in such a way as to enhance the seeming impact of it on the national security. That again is something that has got to be dealt with on a case-by-case basis. It doesn't seem to me that you can ask yourself a lot of "what if's" and cabin the trial judge's discretion.

Mr. GOLDMAN. Thank you.

Mr. MURPHY. Mr. Raimo.

Mr. RAIMO. Thank you, Mr. Chairman.

Mr. Tigar, in your statement you noted that you favor integrating the provisions of this bill into the Federal rules. Other people have suggested that we postpone the whole legislative process and allow these, in effect, changes in the Federal rules to be made pursuant to the normal procedure in which Federal rules are enacted.

What is your opinion on that?

Mr. TIGAR. I wouldn't be opposed to doing that, but I understand there's a lot of pressure to get a bill, and that pressure is being heard from everywhere. I think therefore that any such suggestion is fruitless. But I don't think you really have to wait for the advisory commit-

tee process. This committee has held hearings and it has heard from and actively sought out people of all different persuasions and all different views. That work is reflected in the various drafts that have been circulated at various times, so that a deliberative process has gone on.

I think you accomplish enough if you integrate them into the rules and then provide automatically thereby that as problems crop up, as unanticipated difficulties with this or that provision are demonstrated to exist, the advising and consulting and amending process could take care of it. I think you accomplish enough if you did that.

Mr. RAIMO. Thank you.

Thank you, Mr. Chairman.

Mr. MURPHY. Mr. Tigar, thank you again for your cooperation with this committee as you have done in the past, and I hope in the future.

It is always a pleasure to see you.

Mr. TIGAR. Thank you very much, Mr. Chairman, Congressman McClory. Thank you.

Mr. MURPHY. Our next witness this afternoon is Mr. Michael Scheininger. Mr. Scheininger appeared for the defense in both the *Berrellez* and *Garrity* cases, two prosecutions that helped draw attention to the issue of graymail.

He is accompanied in his testimony by Mr. Thomas Guidoboni.

Mr. Scheininger, thank you very much for appearing today, and gentlemen welcome.

You may proceed.

STATEMENT OF MICHAEL G. SCHEININGER, ESQ., FORMER ASSISTANT U.S. ATTORNEY AND PARTNER, BONNER, THOMPSON, O'CONNELL & GAYNES, ACCOMPANIED BY THOMAS A. GUIDOBONI, ESQ., FORMERLY OF THE DISTRICT OF COLUMBIA PUBLIC DEFENDER SERVICE AND ASSOCIATE, BONNER, THOMPSON, O'CONNELL & GAYNES

Mr. SCHEININGER. Thank you, Mr. Chairman, Mr. McClory.

Mr. Chairman, we have prepared a statement which we would like to submit for the record and particularly in view of Mr. Tigar's testimony, I will only summarize and perhaps read select portions of my prepared statement.

Mr. MURPHY. Without objection.

Mr. SCHEININGER. Thank you, sir.

[The prepared statement of Mr. Scheininger follows:]

STATEMENT OF MICHAEL G. SCHEININGER, FORMER ASSISTANT U.S. ATTORNEY, PARTNER, BONNER, THOMPSON, O'CONNELL & GAYNES

Mr. Chairman. I am honored and privileged to appear today, at the Subcommittee's invitation, to present my views on various bills that have been introduced to deal with the use of national security information in criminal trials. Mr. Guidoboni and I speak on our own behalf as members of the bar who have participated in the defense of criminal cases involving national security.

We know that the various bills now pending in both Houses of Congress are the result of diligent and fairminded efforts to deal with the complex problems of criminal justice and national security. But, we believe that these bills overreact to the actual problems in this area, and that the Administration Bill, in particular, unjustifiably interferes with the rights of a criminal defendant.

Mr. TIGAR. On the whole, I think this bill is deserving of the committee's favorable attention.

However, I would like to raise for the committee's consideration the possibility that you may not need a bill at all, at least not one in this form.

Mr. Chairman, you may recall that in 1973 this committee had before it the proposed Federal Rules of Evidence and at that time the 500 series of rules, including rule 509, which dealt with official information and state secrets. Proposed rule 509 came to the committee surrounded and almost discredited by a last-minute intervention of the Justice Department in the rule-drafting process, and by the Nixon administration's unwarranted claim of the national security executive privilege.

So the committee, for that and other reasons, among which was the fact that the Supreme Court had split 4 to 4 on the crucial lawyer-client privilege issue in *Harper of Row v. Decker*, backed away from codifying the law of privilege.

The present bill, H.R. 4736, is essentially an evidentiary privilege bill. It seems to me, the committee may want to consider, even if this bill is passed as an interim measure, having another look at the whole question of evidentiary privilege.

Because, Mr. Chairman, there really is no difference between a state secret privilege and a lawyer-client or priest-penitent privilege; that is to say, it isn't simply a question of whether the jury hears it or not; there's information that the law says somebody is entitled to keep private. Therefore, I suggest that a separate bill may not be necessary.

Also, I am concerned about this mystique of secrecy, the idea that we have to legislate about something "special" called "state secrets." The mystique of secrecy is always a part of the Government's tactical approach to a case in which national security is involved. They think if they scare hell out of the district judge by informing him or her that this is a case that involves secrets, why, the Government's going to get more material protected than it otherwise might.

If there is to be a bill, however, Mr. Chairman—I have looked this one over, and I have looked over some of the other proposed alternatives that have been put in, both in this House and over in the Senate, and this is the best of the bunch.

I would suggest, however, that the following matters warrant your very careful attention:

First: The section 103 provision for a Government-drafted summary in place of relevant and admissible classified information not only vests, as I said in my prepared statement, tremendous and largely unreviewable discretion, in the district judge, but that substitution of a summary for classified information simply enhances this mystique of secrecy. This is particularly so in espionage cases where the defendant already labors under enough disability just because of the nature of the charge.

I suggest respectfully to the committee that it really works a hardship on the defense, and that if evidence is relevant and admissible, the jury ought to hear it just as it hears any other relevant and admissible evidence, and evaluate it in its totality.

Second: I refer to the provision in section 108 for an appeal.

Under this bill, Mr. Chairman, the Government gets to take an interlocutory appeal from an adverse decision by the district judge. Now, any time you give the Government an appeal in a criminal case, you implicate the following rights:

First: The defendant's right to a speedy trial. Although there's a provision for the appeal being decided swiftly, Mr. Chairman, in the Organized Crimes bill you put a 30-day limit on deciding contempt proceedings relating to grand jury refusals to testify, in section 1826, I believe it was, of title 28, and the courts of appeals simply ignored it, and they are ignoring it to this good day.

The second thing that you may implicate, Mr. Chairman, is the defendant's right to be free.

When this Congress amended the Criminal Appeals Act in 1979, 18 United States Code, section 3731, they said to the Nixon Justice Department, all right, we'll give you the right to appeal from the granting of motion to suppress pretrial, but you are going to have to let the defendant loose while you're up there in the court of appeals.

This bill contains no similar provision.

There isn't any special risk in letting defendants in these sensitive cases go, as Mr. Justice Brennan held in his opinion releasing David Truong pending his appeal. It seems to me that if the Government knows the defendant is going to be on the street, bailed, if it takes its appeal, that's going to be a protection against the Government idly wandering up to the court of appeals just because they don't like what the district judge said.

Third: Mr. Chairman, and perhaps most important, section 110 of the bill says that the rules to be drafted for preserving and protecting classified information in the Federal courts are to be drafted by the Chief Justice of the United States in consultation with the Attorney General and the CIA Director.

Well, the Attorney General and the CIA Director have fairly predictable views on these matters: They are in favor of secrecy. I've never met one who wasn't.

The Chief Justice of the United States on a particular occasion may or may not be in favor of secrecy, but, Mr. Chairman, the rulemaking function vested in the Supreme Court ever since the Federal Rules Enabling Act in the 1930's and on down through the Rules Enabling Act amendments in the 1940's for the criminal rules, and in the 1960's for the rules of evidence have always worked this way.

The whole Supreme Court makes the rules, and they do so after they hear from an advisory committee which consists of a broad representation of members of the bar. On your evidence committee you had Judge Weinstein, you had Mr. Erdahl from the Justice Department, you had my former law partner, Ed Williams; and I think with that kind of solicitation of views, you get a much more balanced presentation, not to mention the greater balance that you get when the Court as a whole, as opposed to whoever happens to be Chief Justice, does the job.

Those are my specific criticisms, Mr. Chairman. I would be willing to answer any questions.

Mr. EDWARDS. Mr. Tigar, those are important criticisms.

I am curious as to what Mr. Halperin or Mr. Adler might say about section 110, is it, regarding the rules, the making of the rules by the

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Chief Justice and the CIA and Attorney General. What is your observation?

Mr. HALPERIN. Well, I think it might well be useful to have the full Court involved, but I must say, as I understand this procedure, it is limited to the question of the storage of the information, and it does not go to what the bill goes to, which are the procedures for determining under what circumstances the information has to be made public at the trial.

That is, it is simply a set of housekeeping rules about safes and storage of information.

While the Congress is often accused of not protecting classified information, in fact the courts sometimes simply lose things. Classified briefs submitted in the *Pentagon Papers* case and other cases have disappeared, literally.

I interpret this very narrowly as relating specifically to safes and locks and procedures for the Court itself and not to any of the substantive matters such as when information has to be made public.

On the other hand, there certainly would be no objection, and it might be useful to keep the pattern and tradition, to substitute for the Chief Justice the Supreme Court of the United States.

Mr. EDWARDS. It is giving this particular type of classified information a mystique by having a different rulemaking body, is that your point of view, Mr. Tigar?

Mr. TIGAR. Yes, Mr. Chairman.

An example of what could be called a simple housekeeping rule is what the Government has attempted to impose on me in cases.

They said, all right, you can have the classified information, but it's going to be kept in a safe in the U.S. attorney's office, and any time you want to use it, even though the court's ruled that you're entitled to it to prepare for the defense, you can come during office hours and the FBI will open the safe and you can sit there and look at this evidence.

And I said, well, you know, I have a safe in my office, and if I signed a piece of paper that said I'll protect these things, I think I am as reliable as most of the FBI agents I know—and maybe more reliable than some.

That seems to hamper the preparation of the defense. That's an example of the kind of drafting problem that input from the defense bar and from a broader spectrum could deal with in the drafting of these rules which, in any case, are going to have to be approved or disapproved by the Congress.

Mr. HALPERIN. I want to point out that I think if it covered that, it would be a very serious problem.

The report of the House committee makes it very clear that the intention is not to cover that. It says specifically, issues of particular effect on the trial process and the rights of defendants, such as defense access to classified material, are to remain within the province of the individual trial judge and the judge's authority to issue protective orders.

The earlier section says it is meant to deal only with the question of how the court itself stores the documents that it has in its possession, what personnel will have access, and the security clearances for court personnel, and so on.

So while I say I think, in the interests of not having a special rule, it might be sensible to change that, I think it is certainly important for this committee to emphasize—whether or not it proposed an amendment—that this section relates only to how the court stores its own information and cannot affect questions precisely of the kind that Mr. Tigar is pointing to.

Mr. EDWARDS. In other words, Mr. Halperin, you are saying this provision is intended to be interpreted much more narrowly than Mr. Tigar indicates it might be?

Mr. HALPERIN. Yes, but I think it would be useful to this committee to make it clear that if it does accept it, it does so based exclusively on this interpretation, and maybe to write in some legislative history that makes it even clearer that what it is talking about here is the question of what kind of safes the Court has to keep the information in, in the courthouse; not talking about precisely the kind of questions Mr. Tigar mentioned, which are a major issue in trials, and which I think do have to—as this bill does—leave them to the discretion of the trial judge.

Mr. EDWARDS. Do you think the legislative history would be enough to offer that type of protection?

Mr. TIGAR. I think that strong legislative history limiting it is more important than whether you make it the court as a whole, because even if it was the court as a whole, I must say with all deference to the Supreme Court, I would not want the Supreme Court and the Director of the CIA and the Attorney General as a group to issue rules which affect defendants' right of access to that information in a trial.

Mr. Chairman, if the legislative history makes it clear that this is simply a question of what kind of a safe the thing has to be kept in and what court personnel can have access to the classified information, much of the force of my objection is blunted.

I am not as sanguine as my Brother Halperin about the beneficial impact of legislative history, but that would certainly go a long way toward solving this problem.

Mr. HALPERIN. Let me just say a word about legislative history, if I can.

I think there's some difference between this area and others in that the bar that deals with these questions is very small. Any benefit that we get out of legislative history will, I can assure you, be called to the attention of any defense attorney that's dealing with a case like this.

I think, on the other side, one has to remember the trial judges now fashion their own rules, and often fashion the rules which I think are clearly unconstitutional—which, I think this bill would make it clear, is not permissible.

Mr. EDWARDS. In regard to section 103, government-drafted summaries, the subcommittee has had experience with some of these. I might observe that we don't like them very much.

In all of the domestic security and FBI hearings we have had, and during the audit by GAO of domestic security activities of the FBI, there's always been an FBI agent standing between the auditor and the file. This has caused considerable problem, as you might guess. The auditor or the GAO might very well be privy to the most sensitive of classified information with regard to nuclear weapons delivery systems

in auditing other agencies, and still did not access any FBI file, even an applicant file. There is always a summary provided to him or her.

I would like to hear Mr. Halperin or Mr. Adler on this subject as to how serious you think the matter is.

Mr. HALPERIN. Mr. Chairman, I would refer you to the House committee report, which I think makes two important points. One is that this procedure does not come into play until the defendants has the information; so you are not talking about a situation in which the Government does a summary, the trial judge looks at it and decides, ex parte, that it's a fair and adequate summary of the information.

This procedure only comes into play after the court has made a determination under the procedures established under section 102, which call for a full, adversary proceeding.

Mr. EDWARDS. You are saying the court is privy to the information? The judge is not limited in some cases to a summary?

Mr. HALPERIN. Not only the court, but defense counsel, because section 103 says, upon a determination by the court authorizing disclosure of specific classified information under the procedures established by section 102—the procedures established by section 102 require a full, adversary proceeding, in camera, under a protective order so that the defense counsel and defendant can't disclose the information.

But the defendant, as I understand the bill, and his counsel get access to the information. There is an argunent, an adversary argument, about whether the information is relevant or not. The judge rules that the information is relevant. The Government can then come forward and say either, we are prepared to stipulate the point the defendant is trying to prove with that information—if the point is the President of the United States authorized a burglary on national security grounds, the Government may move to stipulate the facts. Or they may say, we can substitute some information which provides the same degree of proof to the jury.

Now, I think the issue arises in which there is a different judgment about whether or not it is substantially the same. Here again, the report emphasizes not only the full, adversary hearing and, therefore, the defendant's ability to argue both at the district court level and at the court of appeals that this was not an adequate summary, but it makes it clear that the intent is the court may order this procedure only if it is equivalent disclosure for purposes of a fair trial.

I think, again, language by this committee in its report, emphasizing that this procedure only can be used if the judge is absolutely certain that he is not depriving the defendant of any advantage or any utility of the original information before the jury, including what use an experienced advocate can make of it, would, again, go far toward blunting this situation.

My understanding is also, Mr. Chairman, that district court judges have this right now, under, I think it's rule 16(d) of the Rules of Procedure, to make the same kind of substitution.

Mr. EDWARDS. Mr. Tigar?

Mr. TIGAR. Mr. Chairman, section 102 of the bill has three subsections: 102(c) provides for a Government-triggered, in camera adversary proceeding; 102 (a) and (b) appear to contemplate a situa-

tion in which the defendant has some classified information which he or she wants to disclose.

So, for 102 (a) and (b), Mr. Halperin is right. Section 102(c) refers to a situation in which the Government anticipates that classified information may become an issue in the case. It then moves.

Page 16 of the Permanent Select Committee on Intelligence Report of March 19, 1980, makes clear that this Government-triggered proceeding is designed for situations in which the defendant does not already have the classsified information in his or her possession.

Thus, in a 102(c) situation, the 103 hearing would, as I read the bill and the legislative history, permit the district judge to authorize a substitution of a summary for classified information that the defendant and his or her counsel has never seen.

We are not talking here, Mr. Chairman, about the discovery process, Federal Rule of Criminal Procedure 16; we are talking about trial evidence, not just something to help you prepare for your case; so that what you have is the district judge and the Government getting together and agreeing that a summary is adequate. And they do it ex parte.

In *Dennis* v. *United States*, Mr. Chairman, 384 U.S. 855, the Supreme Court said with respect to the district judge's review of a grand jury testimony transcript, "In our system it is enough for judges to judge."

The Court went on to say that determinations of what may be useful to the defense can effectively and properly be made only by an advocate.

It's only the advocate, looking over the actual classified stuff, who can pick out the parts of it that are going to get lined up on the jury rail at summation time, when you try to put them all together and establish that there's a reasonable doubt—which is, after all, what the process is supposed to be about.

That, Mr. Chairman, is my objection to section 103.

Mr. EDWARDS. Mr. Halperin?

Mr. HALPERIN. If it is correct that it contemplates that kind of ex parte procedure, I think it would be totally unacceptable.

I do not read the bill as permitting even under those circumstances—my understanding is that even where the Government is in possession of the information and under the Government-triggered procedures, nevertheless, the defendant is informed of what the information is. The same adversary proceeding must take place, whether or not the information was in possession of the Government or in the possession of the defendant.

If there's any question about that, then I think I'd like to look over the bill and the report, and perhaps submit something for the record on it. I think if there was any question about that, either an amendment or some legislative history would be necessary to make it absolutely clear that under no circumstances can that decision be made except after an adversary hearing.

Mr. EDWARDS. I appreciate that testimony.

Counsel?

Ms. LEROY. Mr. Tigar, you are currently involved in a case that in the future would be covered by this bill. Can you tell us how this

bill would have affected the handling of that case up to this point, or whether it would have affected it?

Mr. TIGAR. You are referring to *United States* v. *Truong and Humphrey?*

Ms. LEROY. Yes.

Mr. TIGAR. Counsel, I believe that this bill would have codified, essentially, the procedures which we eventually wound up agreeing on with the Government, under some prodding by the district judge. So what took 10 days, out of the 30 that we had to prepare for trial, would have taken 1 day. That's the only difference with respect to how things finally came out.

In other cases, there would have been great differences. For example, in the *Kearny* case, where the Government prosecuted the FBI agent in New York, the Justice Department took the view that defense counsel had to go get security clearances before they could even start the discovery process, which seemed silly, but at any rate put an intolerable delay in there and also began to serve to enhance the mystique of secrecy.

After all, if the able, experienced prosecutor is going to let the jury know that all the lawyers had to have security clearances in order to see this stuff, that simply enhances that mystiqe.

I don't mean to ramble on. It seems to me the fact that we negotiated something that looks like a lot of this bill in the course of lawyers butting heads in the *Truong* case is a tribute to the amount of work that's been done and careful attention that's been paid in drafting some of these provisions.

Ms. LEROY. Well, have there been any cases in the last year or two you are aware of where the results would have been different, or the procedures would have been different, if this bill had been passed?

Mr. TIGAR. Yes; I had forgotten one example in the *Truong* case: this bill imposes upon the government a duty to come forward with all the classified information that's relevant and material, not only to the elements of the offense, but to cross-examination as well, and lay it all on the table and have the hearing. And if they don't, they are in trouble; and the bill makes that clear.

In *Truong*, when we got to the court of appeals, we learned that a piece of evidence in the possession of the CIA, a secret report, which contradicted the testimony of the Government's principal witness on the crucial issue of the espionage charge, had been withheld from the U.S. attorney by the CIA, and, thus, withheld by the U.S. attorney from the court.

Now, this bill would leave the Government with no excuse whatever for that sort of behavior. The excuse under the circumstances was that, well, gee, the CIA has their own problems and can't always be expected to understand what their duties are in the trial process.

This bill makes clear that the CIA is a part of the U.S. Government, to the extent that it wants to invoke the criminal process to protect its interests; and I am for legislation that makes them part of the U.S. Government, because I am not sure they always understand that.

Ms. LEROY. So you would say this bill would help the defense as much as the prosecution in these cases?

Mr. TIGAR. With the exceptions I have noted, it is. I think there is disproportionality in the three parts of the bill that I mentioned, treating appeals in these sorts of cases differently, the rulemaking provisions, and the summary procedure.

Mr. EDWARDS. Do you think the CIA has an affirmative duty—a reversible duty, shall we say—to give that information to the court?

Suppose the CIA is involved in a sort of subsidiary way to the case, involved as a part of the Government and not a major factor in the case; and CIA has this information, and it knows it has this information that is relevant to the defense and trial, perhaps information about an informant, or something like that.

Do you think that there is presently an affirmative obligation on the CIA to tell the defense attorney?

Mr. TIGAR. Yes; Mr. Chairman, the obligation is principally in the U.S. attorney prosecuting, who has the duty to go seek out all potentially exculpatory evidence. The Supreme Court has imposed that burden on the attorney for the Government, representing the Government.

The Supreme Court of the United States has never passed on that question directly in the context in which you raise it, although, in *Santobello* v. *New York* they held that a plea-bargain promise made by one prosecutor was binding on another prosecutor.

The D.C. Circuit has addressed the question directly, not in the context of the CIA, but in the BNDD, the predecessor to the present DEA, in *United States* v. *Bryant*, decided in 1971 in an opinion by Judge J. Skelly Wright. And there the court held that the fact that a tape recording which contradicted the testimony of a Government witness, although it was in the possession of another agency, nonetheless there was a burden on the Government to produce it.

Now, the Supreme Court has held in *United States* v. *Agurs*, that there's some duty on the defense to come forward and tell the prosecutor what kinds of exculpatory material may be out there; but once you've met the *Agurs* burden, the answer to your question is unequivocally "yes."

Ms. LEROY. In testimony before this subcommittee the CIA suggested that a provision be added to the bill to permit the Government to prove the contents of a classified document without actually introducing the document or duplicate, into evidence. I think that provision is section 8(1) of the administration's bill.

The CIA indicated the provision might be useful in cases involving an unsuccessful attempt to deliver classified documents to an agent of a foreign government. The CIA's concern centered on the possibility of disclosing at trial the same evidence they succeeded in not having transmitted to the foreign government.

I wonder if all of you would comment on that provision?

Mr. HALPERIN. I think the remedy to that problem, which I think is a real one, is to change the espionage laws, and not to change the procedures for handling classified information at trial.

I think what the CIA proposes is unconstitutional. I think the Supreme Court made that clear in *Gorin* when it said that the question of whether the information relates to the national defense is a factual question for the jury; if it's a factual question for the jury, the jury

has to be given the evidence on which to make that factual determination.

I think Congress could draft a statute that made it a crime to do what is described in these scenarios, which would not depend on the quality of the information that was passed. I think if Congress wants to do that, it ought to do that.

But it ought not to change the rules for trials to deal with a problem which is created by the fact that there is not a criminal statute that deals with that issue.

Mr. TIGAR. I think the concerns expressed by the CIA are captious.

Yes; it's true that sometimes by having fair trails, you are going to have to dismiss or not have espionage cases. Well, as Edward Bennett Williams once said to the Supreme Court of the United States, when the same question was asked of him we have to remember that espionage has the lowest recidivism rate of any Federal offense. Most espionage cases, as a matter of fact, aren't handled through trial procedures; they get handled other ways—at least where foreigners are involved. And I don't worry too much about the bogieman theory.

Coming to the merits, Mr. Halperin is right: The procedure is unconstitutional.

I can give you an example of how inadequate it is from the *Truong* case:

One document that was said to have been transmitted, was introduced in evidence. Three government witnesses testified that three different parts of it affected the national defense of the United States. And each of the three said that what the other two had identified as affecting the national defense didn't. One was a Defense person, one was a State Department person, one was a CIA person.

That illustrates the problem in having a summary witness, because you can't pick away at the Government's theory through cross-examination by pointing to the ludicrousness of the differences between the line-by-line analyses of the document that the jury has in front of it.

And if there's any doubt about the question: Ask your CIA witness to take this document—this is March 18, 1980—this is the Report of the Committee on Intelligence. It contains 33 pages, it's an average-sized government document.

Say, all right, put it away. You no doubt read it before you came in here. Now, summarize it for us—and don't leave out anything important.

Ms. LEROY. The administration, when it testified before the subcommittee, also suggested that a standard similar to that by which disclosure of the names of Government informants be used to determine whether or not classified material be disclosed at public trial.

Would both of you, or all of you, respond?

Am I not making myself clear?

Mr. HALPERIN. Well, I have the advantage of having been here, so I know what you mean.

That goes to the heart of what I think is the basic issue involved here, which is that this bill, I think, makes it absolutely clear that there is no State secrets privilege in a criminal trial.

I think that is the law now. There is no case that suggests the opposite. There are some Supreme Court decisions that suggest that that is the situation.

I think any effort to change that would be unconstitutional.

And I think one of the advances of this bill as it came out of the House Intelligence Committee was that it makes it absolutely clear that there is no such privilege; and that the standard for the admission of information does not change in the slightest if the information is classified.

That's the position that Judge Learned Hand laid down a long time ago in *Andolshek*, and I think it's been undisturbed. That paragraph has been cited with approval by the Supreme Court several times. I think it is simply a requirement of the Constitution.

Ms. LEROY. Mr. Tigar, what I am talking about there is reliance on the *Rovairo* decision on changing the standard of admissibility for classified information.

Mr. TIGAR. *Rovairo* involved the trial judge's weighing of factors when the pretrial criminal discovery process comes upon the problem of disclosure of an informer's identity. *Rovairo* has nothing whatever to do with the admissibility of evidence in a criminal trial.

If the *Rovairo*-type standard applied, then what you have in effect is a different standard of relevancy when classified information is at issue. And that does pose serious constitutional problems.

And, as Judge Learned Hand said—not in *Andolshek*—but he adopted *Andolshek* views and expanded on them in *Coplan, United States* v. *Coplan*—that's a freedom-destroying theory for a government to adopt; that when—surely, governmental interests are great, but so are the accused's; because the stakes are so high—to adopt a different rule for cases where these things are at issue is simply impermissible.

Ms. LEROY. Thank you, I have no more questions.

Mr. EDWARDS. Counsel?

Mr. BOYD. Thank you, Mr. Chairman, no questions.

Mr. EDWARDS. Mr. Tigar, I believe you mentioned another subject—citing 18 U.S. Code 3731 as a model permitting interlocutory appeals by the Government in Federal criminal proceedings. That statute provides for release of the defendant on bail pending the appeal.

Should a similar provision be added to this bill?

Mr. TIGAR. Exactly, Mr. Chairman.

I think you could drop the whole appeal section right out of this bill, and just amend 3731; or add a subsection to 3731.

Of course, that provision should be added. And, as well, the certification procedures of 3731, which are a little more onerous, as I recall, than the certification procedures in the present bill, ought also to be applied. That is, the counsel, Government counsel's, certificate as to the reasons for the appeal.

Mr. EDWARDS. Do you agree?

Mr. HALPERIN. Yes; I think that would be an appropriate change.

Mr. EDWARDS. Numerous court decisions have held that the power to prosecute and the correlative power not to prosecute belongs solely to the executive branch. This includes a decision whether to disclose national security data, or drop the prosecution as an issue in graymail cases. Section 105 of this bill requires a court to fashion an appropriate remedy where the Attorney General objects to the disclosure of otherwise admissible information.

Such remedy includes dismissal of some counts of the indictment, striking or precluding testimony of a witness, finding against the Government on any issue to which the precluded information relates.

My question, then, is: Does this section 105 at least partially take the executive prosecutorial function to the judge, and is this shift constitutionally permissible?

Mr. TIGAR. Mr. Chairman, adverse inferences have been drawn against parties who refuse to produce information ever since the common law has been in existence.

And down to this good day the law has been the same. In *Societe Internationale* v. *Rogers*, the Supreme Court held that a civil litigant could be poured out of court for refusal to produce information. And in criminal cases, the correlative duty of the trial judge to oversee the fairness of the process and impose sanctions upon a fractious government that refuses to produce relevant evidence, was upheld by Judge Learned Hand in the *United States* v. *Andolshek and Coplon*, cited with approval in the *Dennis* case.

So I don't think there's any constitutional problem there.

Mr. EDWARDS. Does anybody have any further observations?

Mr. HALPERIN. Just thank you.

Mr. TIGAR. Thank you.

Mr. ADLER. Thank you.

Mr. EDWARDS. Thank you very much for some very helpful testimony.

The committee stands adjourned.

[Whereupon, at 2:55 p.m., the committee hearing was adjourned.]

ADDITIONAL MATERIAL

CONGRESS OF THE UNITED STATES,
COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Washington, D.C., March 31, 1980.

SUMMARY OF SELECTED CASES IN WHICH NATIONAL SECURITY INFORMATION HAS BEEN AN ISSUE

U.S. v. *Berrellez*

Robert Berrellez was ITT's director of inter-American relations in its office in Santiago, Chile during the time of Salvadore Allende's 1970 presidential campaign. The CIA allegedly encouraged and assisted ITT in funneling hundreds of thousands of dollars into the campaign fund of Allende's opponent. The Justice Department brought perjury charges against Mr. Berrellez in 1978, alleging that he had lied during a 1973 Senate subcommittee hearing regarding links between ITT and the CIA in Chile.

When the case was about to go to trial, the Justice Department asked for a closed hearing in which the court could review the sensitive evidence the defense had indicated it would present at trial. A protective order to circumscribe areas the defense could touch on in trial was also requested. After the closed hearing, at which the defense showed how the sensitive data was relevant to its case, the court ruled that the defense could use the data in presenting its case. The judge also issued a protective order, but the government felt that the order was insufficient.

The government sought appellate review of the court's decision, both as to admissibility and as to the protective order, by petitioning for a writ of mandamus, but the appeals court denied the petition saying that the trial judge had "shown a proper sensitivity to the requirements of national security." The government then had to decide whether to allow the data to be revealed or to drop the case. It chose to drop the case.

U.S. v. *Kampiles*

In November, 1978, William Peter Kampiles was tried and convicted in federal district court in Hammond, Indiana, on espionage charges stemming from his transmittal to the Soviets of a top-secret technical manual describing the KH–11 photographic satellite system. The government's case was based primarily on Kampiles' confession (recanted at trial) that, shortly before he left his job as a Watch Officer at CIA headquarters in Langley, he stole the manual, took it with him when he travelled to Greece to visit relatives, and sold it to an employee of the Soviet Embassy in Athens for $3,000.

The classified document itself, the KH–11 manual, was central to the case. Obviously, it would be a major element in the trial. The government sought and was granted a protective order prohibiting the defendant and his attorneys from disclosing any information about the manual after they received a copy. The government then sought and received a supplementary protective order regarding certain specific information in the manual that the government felt was particularly sensitive. That information included the location of any ground stations in the KH–11 system and various measures of the image quality of the system.

Ultimately, disclosure of the complete manual was restricted to the defendant and his attorneys. The jury received an edited version, which omitted the particularly sensitive material. The defense did not object to any of the government's requests for protective orders or other attempts to minimize disclosure of classified information, including the introduction of the edited version of the manual.

ADMINISTRATIVE OFFICE
OF THE U.S. COURTS,
Washington, D.C., June 2, 1980.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: At its meeting in March 1980, the Judicial Conference of the United States considered H.R. 4736, a bill to establish certain pretrial and trial procedures for the use of classified information in connection with federal criminal cases. The Conference has requested that I advise you that it approved the bill, subject to two modifications. In the view of the Conference, the promulgation of security procedures should more appropriately be made the responsibility of the Judicial Conference or a duly designated committee rather than that of the Supreme Court or the Chief Justice. The Conference is also of the opinion that a period of 180 days, rather than only 120 days, should be provided for the enactment of rules establishing security procedures.

The implementation of the Conference's suggestions would require the following modifications in H.R. 4736:

(1) In Section 110(a), at page 14, line 4, the word "twenty" he deleted and in lieu thereof, the word "eighty" be substituted.

(2) In Section 110(a), at page 14. lines 5 and 6, the words "the Supreme Court of the United States" be deleted and in lieu thereof, the words "the Judicial Conference or a duly designated committee thereof" be substituted.

Sincerely,

WILLIAM E. FOLEY, *Director.*

AMERICAN BAR ASSOCIATION,
February 27, 1980.

Re: Classified Information Criminal Trial Procedures Act.

Hon. DON EDWARDS,
Chairman, Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: At the meeting of the House of Delegates of the American Bar Association held February 4–5, 1980 the attached resolution was adopted upon recommendation of the Section of Criminal Justice and the Standing Committee on Law and National Security. The action taken thus becomes the official policy of the Association in this matter.

This resolution is transmitted for your information and whatever action you may deem appropriate. If hearings are scheduled on the subject of this resolution, we would appreciate your advising Herbert E. Hoffman, Director of the American Bar Association Governmental Relations Office, 1800 M Street, N.W., Washington, D.C. 20036, (202) 331–2210.

Please do not hesitate to let us know if you need any further information, have any questions or if we can be of any assistance.

Sincerely yours,

F. WM. MCCALPIN.

Attachment.

Resolved, That the American Bar Association supports enactment of "graymail" legislation which will appropriately accommodate and balance the need of the government to avoid unwarranted disclosure of national security information in criminal investigations and trials and the need to assure the accused in criminal cases their right to fair trial. To accomplish these objectives, the American Bar Association recommends:

1. That Congress amend either the Federal Rules of Criminal Procedure or the Federal Rules of Evidence to incorporate the proposal legislative changes;

2. That in cases involving classified information, a mandatory pre-trial conference be ordered by the court on motion of either the prosecution or defense;

3. That the mandatory pretrial conference be held in camera at the request of the government to avoid unwarranted disclosure of classified information;

4. That after reviewing (1) the ex parte submission by the prosecution of classified information which the defense proposes to disclose, and after both the prosecution and defense have had an opportunity to be heard, the court may order that,

(a) all of the classified information be disclosed to the defense and/or be available for use at trial or other proceedings; or

(b) only portions of the classified information be so disclosed and/or available; or

(c) only summaries of some or all of the classified information be so disclosed and/or available; or

(d) none of the classified information be so disclosed and/or available; or

(e) the prosecution may proffer a statement admitting for purposes of the proceedings or trial any relevant facts such classified information would tend to prove, provided that the court must proceed pursuant to subsection (a) above if it finds that, with use of the other alternatives, disclosure of the classified information would remain relevant and material to an element of the criminal offense, to a legally cognizable defense, or to the credibility, bias, or interest of any witness;

5. That all classified information not disclosed to an accused be placed under seal of the court and be secured and maintained for appeal;

6. That 18 U.S.C. § 3731 be amended to provide for interlocutory appeal before or during trial from an order of the trial court in a criminal case requiring or denying the disclosure of classified information, imposing or refusing sanctions for nondisclosure of classified information or granting or refusing a protective order to prevent the diclosure of classified information, provided that provision be made for expeditious resolution of any such appeal and the provisions of Section 3731 on pretrial release be followed;

7. That the Attorney General, Deputy Attorney General, or a designated Assistant Attorney General be required to make to the court the initial invocation of these classified information procedures;

8. That provisions in pending graymail legislation amending the Jencks Act (18 U.S.C. § 3500) be opposed as presently drafted; but that if alternative amendments are proposed, that they appropriately accommodate and balance the need of the government to avoid unwarranted disclosure of national security information and the need to assure the accused in criminal cases their right to a fair trial;

9. That if as a result of the procedures adopted in the graymail legislation the defense is required to disclose information it would not otherwise be required to disclose under the Federal Rules of Criminal Procedure, then the government shall be required to disclose to the defense that information it will rely on to rebut what the defense has disclosed, (thus providing that if the defense is required to reveal the identity of its witnesses who will disclose the particular classified information at issue, the government will disclose the witnesses it will call in rebuttal); and that in light of this, inclusion of a "bill of particulars" provision in the graymail legislation is unnecessary; and

10. That provisions in pending "graymail" legislation should be opposed which would impose on the Department of Justice automatic, detailed reporting requirements to the Congress whenever a decision is made not to prosecute a person because of the possibility that classified information will be revealed.

JUNE 12, 1980.

Hon. EDWARD P. BOLAND,
Chairman, House Permanent Select Committee on Intelligence,
Capitol, Washington, D.C.

DEAR MR. CHAIRMAN: As you know, the Subcommittee on Civil and Constitutional Rights is considering H.R. 4736, which was recently reported by your Committee.

At one of the Subcommittee's hearings on the bill, a witness expressed the concern that a situation could arise in which the defense, or even the court, might not have complete access to classified information clearly relevant to his defense and admissible under applicable Rules of Evidence.

The situation would arise as follows:

1. Sec. 102(c) of the bill permits the government to initiate the in camera proceeding to determine the relevance and admissibility of the classified information.

2. In such cases, when the government has not already made the information available to the defense, the government, in notifying the defense of the information at issue, may refer to the information by generic category, rather than actually identify the information.

3. At the in camera proceeding triggered by Sec. 102 referred to above, the court determines the relevance and admissibility of the information. The bill is silent to the nature of the hearing, although the legislative history indicates the proceeding is to be a fully adversary hearing.

4. After the determination of admissibility is made under Sec. 102, Sec. 103 permits the government to request—and the court to order—the substitution of a summary or admission for the actual classified information. Thus, it is

possible that, in a government ordered proceeding involving classified information not already in the possession of the defense, the defense might not have complete access to relevant material, but might be limited to summaries or descriptions of generic categories.

The bill does not require this result, but because of its silence on both the nature of the 102 proceeding and the requirements of the government to disclose in the course of the proceeding, such a result is not prohibited either. A zealous prosecutor could argue that the material at issue is too sensitive to be disclosed even to the defense in an in camera proceeding to determine relevance, much less at the trial itself. A literal reading of the bill might not preclude this result.

Other witnesses disagreed and maintained that such was not the intent of the Intelligence Committee in drafting the bill. They argued that a truly adversary proceeding under Sec. 102 (which the bill seems to contemplate) would require defense access to all classified information at issue in such a proceeding.

I believe that further clarification is necessary. I would appreciate your letting me know your understanding of the Intelligence Committee's intent. Any information or comments you or the Committee could provide to clear up the confusion would be very helpful.

Thank you for your assistance.

With kind regards,

Sincerely,

DON EDWARDS,
Chairman, Subcommittee on Civil and Constitution Rights.

U.S. HOUSE OF REPRESENTATIVES,
PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C., June 12, 1980.

HON. DON EDWARDS,
Chairman, Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, House Office Building Annex, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your letter of June 12 seeking clarification of a possibly confusing aspect of the graymail bill now before your subcommittee.

It is not the intent of the Intelligence Committee to authorize, nor, I believe, would the bill permit, the result suggested by your witness and reflected in point 4 of your letter.

The scenario outlined in your letter is based on the faulty premise that, because of the generic category provision of section 102(e), a section 102 or 103 proceeding could be held regarding information not in the possession of the defendant. No such hearing may be held; consequently, the defendant will never be in the position of being required to introduce summaries of generic categories.

The purpose of a section 102 proceeding is to determine prior to trial the admissibility, at trial, of classified information already in the possession of the defendant. The purpose of a section 103 proceeding is to determine if admissible evidence in the possession of the defendant may be introduced in a summary form. The information in the possession of the defendant may have been supplied to the defendant by the government pursuant to a pre-trial discovery request, or it may have been acquired by the defendant from some other source.

To facilitate the argument, at a 102 proceeding, as to the admissibility of such information, section 102(e) requires the government to give notice, prior to the proceeding, of the classified information at issue. If the classified information the defendant posseses was given to him by the government, the government will have already confirmed its sensitivity; therefore, the required notice can be specific. However, if the sensitive information at issue was obtained by the defendant from a non-government source, then the government is not required to confirm its accuracy or to expand the defendant's knowledge of classified information, and the required notice can be by generic category. This is all that is contemplated by section 102(e).

In conclusion, I would emphasize that it is the intent of the Intelligence Committee, as reflected in its report, that all hearings to be conducted pursuant to sections 102 and 103 of H.R. 4736 will be fully adversary and will be concerned only with information to which the defendant will have had full access.

With every good wish, I am

Sincerely yours,

EDWARD P. BOLAND, *Chairman,*

I

96TH CONGRESS
1ST SESSION

H. R. 4736

To establish certain pretrial and trial procedures for the use of classified information in connection with Federal criminal cases, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 11, 1979

Mr. MURPHY of Illinois (for himself, Mr. BOLAND, Mr. MCCLORY, Mr. ZABLOCKI, Mr. BURLISON, Mr. ASPIN, Mr. ROSE, Mr. MAZZOLI, Mr. MINETA, Mr. FOWLER, and Mr. DANIELSON) introduced the following bill; which was referred jointly to the Committee on the Judiciary and the Permanent Select Committee on Intelligence

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A BILL

To establish certain pretrial and trial procedures for the use of classified information in connection with Federal criminal cases, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Classified Information Criminal Trial Procedures Act".

TITLE I—PROCEDURES FOR DISCLOSURE OF CLASSIFIED INFORMATION IN CRIMINAL CASES

PRETRIAL CONFERENCES

SEC. 101. At any time after the filing by the United States of an indictment or information in a United States district court, any party to the case may request a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. Upon such a request, the court shall promptly hold a pretrial conference to establish a schedule for any request for discovery of classified information and for the implementation of the procedures established by this title. In addition, at such a pretrial conference the court may consider any other matter which may promote a fair and expeditious trial.

PROCEDURES FOR DISCLOSURE OF CLASSIFIED INFORMATION

SEC. 102. (a)(1) Whenever a defendant in any Federal prosecution intends to take any action to disclose or cause the disclosure of classified information in any manner in connection with such prosecution, the defendant shall, before such disclosure and before the trial or any pretrial hearing, notify the court and the attorney for the United States of such intention and shall not disclose or cause the disclosure of such information unless authorized to do so by the court in

accordance with this title. Such notice shall include a brief description of the classified information that is the subject of such notice.

(2)(A) Within ten days of receiving a notification under paragraph (1) or otherwise learning before the trial or any pretrial hearing that any action of a defendant will require or is likely to result in the disclosure of classified information at the trial or such pretrial hearing, the United States, by written petition of the Attorney General, may request the court to conduct a proceeding to make all determinations concerning the use, relevance, or admissibility of the classified information at issue that would otherwise be made during the trial or a pretrial hearing. Upon such a request, the court shall conduct such a proceeding.

(B) Any proceeding held pursuant to a request under subparagraph (A) (or any portion of such proceeding specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information.

(C) If a request for a proceeding under this subsection is not made within ten days or if, at the close of such a proceeding, the determination of the court regarding the use, relevance, or admissibility of the classified information at issue is favorable to the defendant, the court shall authorize the

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defendant to disclose or cause the disclosure of the classified information at the trial or at any pretrial hearing, but such disclosure may not be made before the time for the United States to appeal such determination under section 108 has expired. If the United States takes such an appeal, such disclosure may not be made until such appeal is decided.

(b)(1) Whenever a defendant in a Federal prosecution intends to take any action to disclose or cause the disclosure, during the trial or any pretrial hearing, of any classified information and the defendant has not given notice under subsection (a)(1) with respect to such disclosure because the interest of the defendant in such disclosure reasonably could not have been anticipated before the expiration of the time for giving such notice, the defendant shall, before taking such action, notify the court and the attorney for the United States of such intention and shall not disclose or cause the disclosure of such information unless authorized by the court to do so in accordance with this title. Such notice shall include a brief description of the classified information that is the subject of such notice.

(2)(A) Within forty-eight hours of the receipt of a notification under paragraph (1), the United States, by written petition of the Attorney General, may request the court to conduct a proceeding to make all determinations concerning the use, relevance, or admissibility of the classified information at

issue. Upon such a request, the court shall conduct such a proceeding.

(B) Any proceeding held pursuant to a request under subparagraph (A) (or any portion of such proceeding specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information.

(C) If a request for a proceeding under this subsection is not made within forty-eight hours or if, at the close of such a proceeding, the determination of the court regarding the use, relevance, or admissibility of the classified information at issue is favorable to the defendant, the court, subject to the provisions of section 106, shall authorize the defendant to disclose or cause the disclosure of the classified information at the trial or any pretrial hearing, but such disclosure may not be made before the time for the United States to appeal such determination under section 108 has expired. If the United States takes such an appeal, such disclosure may not be made until such appeal is decided. In any order of the court under this subsection that is favorable to the defendant, the court shall specify the time to be allowed the United States to appeal such order under section 108.

(c)(1) Whenever the United States learns during a criminal trial or a pretrial hearing in connection with a criminal

trial (other than by notification pursuant to subsection (b)(1)) that any action of the defendant will result in, or is likely to result in, the disclosure of classified information which has not been the subject of pretrial notice under subsection (a), the United States, by written petition of the Attorney General, may request the court to conduct a proceeding to make all determinations concerning the use, relevance, or admissibility of the classified information at issue. Upon such a request, the court shall conduct such a proceeding.

(2) Any proceeding held pursuant to a request under paragraph (1) (or any portion of such proceeding specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information.

(3) If, at the close of a proceeding held pursuant to this subsection, the determination of the court regarding the use, relevance, or admissibility of the classified information at issue is favorable to the defendant, the court, subject to the provisions of section 106, shall authorize the defendant to disclose or cause the disclosure of the classified information at the trial or at any pretrial hearing, but such disclosure may not be made before the time for the United States to appeal such determination under section 108 has expired. If the United States takes such an appeal, such disclosure may

not be made until such appeal is decided. In any order of the court under this subsection that is favorable to the defendant, the court shall specify the time to be allowed the United States to appeal such order under section 108.

(d) Upon receiving a request from the United States for a proceeding under subsection (a)(2), (b)(2), or (c)(1), the court shall issue an order prohibiting the defendant from disclosing or causing the disclosure of the classified information at issue pending conclusion of the proceeding.

(e) Before any proceeding is conducted pursuant to a request by the United States under subsection (a)(2), (b)(2), or (c)(1), the United States shall provide the defendant with notice of the classified information that is at issue. Such notice shall identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States. When the United States has not previously made the information available to the defendant, the information may be described by generic category rather than by identification of the specific information of concern to the United States.

(f) During the examination of a witness by a defendant in any criminal proceeding, the United States may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible in accordance with the procedures established by

this title. Upon such an objection, the court shall take such action to determine whether the response is admissible as will safeguard against the disclosure of any classified information. Such action may include requiring the United States to provide the court with a proffer of the response of the witness to the question or line of inquiry anticipated by the United States and requiring the defendant to provide the court with a proffer of the nature of the information sought to be elicited.

ALTERNATIVE PROCEDURE FOR DISCLOSURE OF CLASSIFIED INFORMATION

SEC. 103. (a) Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by section 102, the United States may move that, in lieu of the disclosure of such specific classified information, the court order—

(1) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or

(2) the substitution for such classified information of a summary of the specific classified information.

The court shall grant such a motion of the United States if it finds that the defendant's right to a fair trial will not be prejudiced thereby. The court shall hold a hearing on any motion

under this section. Any such hearing shall be held in camera at the request of the Attorney General.

(b) The United States may, in connection with a motion under subsection (a), submit to the court an affidavit of the Attorney General certifying that disclosure of the classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by the United States, the court shall examine such affidavit in camera and ex parte.

SEALING OF RECORDS OF IN CAMERA PROCEEDINGS

SEC. 104. If at the close of an in camera proceeding under this title (or any portion of a proceeding under this title that is held in camera) the court determines that the classified information at issue may not be disclosed or elicited at the trial or any pretrial hearing, the record of such in camera proceeding shall be sealed and preserved by the court for use in the event of an appeal.

PROHIBITION ON DISCLOSURE OF CLASSIFIED INFORMATION BY DEFENDANT; RELIEF FOR DEFENDANT WHEN UNITED STATES OPPOSES DISCLOSURE

SEC. 105. (a) Whenever the court denies a motion by the United States that it issue an order under section 103(a) and the United States files with the court an affidavit of the Attorney General objecting to disclosure of the classified in-

formation at issue, the court shall order that the defendant not disclose or cause the disclosure of such information.

(b) Whenever a defendant is prevented by an order under subsection (a) from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information. However, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate. Such action may include—

(1) dismissing specified counts of the indictment or information;

(2) finding against the United States on any issue as to which the excluded classified information relates; or

(3) striking or precluding all or any part of the testimony of a witness.

FAILURE OF DEFENDANT TO PROVIDE PRETRIAL NOTICE

SEC. 106. If a defendant fails to comply with the notice requirements of subsection (a) or (b) of section 102 and the court finds that the defendant's need to disclose or cause the disclosure of the classified information at issue reasonably could have been anticipated before the expiration of the time for giving such notice under such subsection, the court may

prohibit the defendant from disclosing or causing the disclosure of such classified information during trial and may prohibit the examination by the defendant of any witness with respect to any such information.

RECIPROCITY; DISCLOSURE BY THE UNITED STATES OF REBUTTAL EVIDENCE

SEC. 107. (a) Whenever the court determines, in accordance with the procedures prescribed in section 102, that classified information may be disclosed in connection with a criminal trial or pretrial hearing or issues an order pursuant to section 103(a), the court shall—

(1) order the United States to provide the defendant with the information it expects to use to rebut the particular classified information at issue; and

(2) order the United States to provide the defendant with the identity of any witness it expects to use to rebut the particular classified information at issue.

(b) If the United States fails to comply with an order under subsection (a), the court, unless it finds that the use at trial of information or a witness reasonably could not have been anticipated, may exclude any evidence not made the subject of a required disclosure and may prohibit the examination by the United States of any witness with respect to such information.

(c) Whenever the United States requests a pretrial proceeding under section 102, the United States, upon request of the defendant, shall provide the defendant with a bill of particulars as to the portions of the indictment or information which the defendant identifies as related to the classified information at issue in the pretrial proceeding. The bill of particulars shall be provided before such proceeding.

APPEALS BY THE UNITED STATES

SEC. 108. (a) The United States may appeal to a court of appeals before or during trial from any decision or order of a district court in a criminal case requiring or authorizing the production, disclosure, or use of classified information, imposing sanctions for nondisclosure of classified information, or denying the issuance of a protective order sought by the United States to prevent the disclosure of classified information, if the Attorney General certifies to the district court that the appeal is not taken for purpose of delay.

(b)(1) If an appeal under this section is taken before the trial has begun, the appeal shall be taken within ten days after the date of the decision or order appealed from, and the trial shall not commence until the appeal is decided.

(2) If an appeal under this section is taken during the trial, the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals (A) shall hear argument on such appeal within four days of the adjournment of the trial,

(B) may dispense with written briefs other than the supporting materials previously submitted to the trial court, (C) shall render its decision within four days of argument on appeal, and (D) may dispense with the issuance of a written opinion in rendering its decision.

(c) Any appeal and decision under this section shall not affect the right of the defendant, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

PROTECTIVE ORDERS

SEC. 109. (a) Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.

(b) Pursuant to its authority under the Federal Rules of Criminal Procedure, the court may authorize the United States to delete specified items of classified information from documents to be made available to the defendant, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The motion of the United States requesting such authorization (and materials submitted in support of such motion) shall,

upon request of the United States, be considered by the court in camera and shall not be disclosed to the defendant.

SECURITY PROCEDURES

SEC. 110. (a) Within one hundred and twenty days of the date of the enactment of this Act, the Supreme Court of the United States, in consultation with the Attorney General and the Director of Central Intelligence, shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeals, or Supreme Court. Such rules, and any changes in such rules, shall be submitted to the appropriate committees of Congress and shall become effective forty-five days after such submission.

(b) Until such time as rules under subsection (a) first become effective, the Federal courts shall in each case involving classified information adopt procedures to protect against the unauthorized disclosure of such information.

IDENTIFICATION OF INFORMATION RELATED TO THE NATIONAL DEFENSE

SEC. 111. In any prosecution in which the United States must establish as an element of the offense that material relates to the national defense or constitutes classified information, the United States shall notify the defendant, within the time specified by the court, of the portions of the

material that it reasonably expects to rely upon to establish such element of the offense.

FUNCTIONS OF ATTORNEY GENERAL MAY BE EXERCISED BY DEPUTY ATTORNEY GENERAL AND A DESIGNATED ASSISTANT ATTORNEY GENERAL

SEC. 112. The functions and duties of the Attorney General under this title may be exercised by the Deputy Attorney General and by an Assistant Attorney General designated by the Attorney General for such purpose and may not be delegated to any other official.

DEFINITION

SEC. 113. As used in this title, the term "classified information" means information or material that is designated and clearly marked or clearly represented, pursuant to the provisions of a statute or Executive order (or a regulation or order issued pursuant to a statute or Executive order), as information requiring a specific degree of protection against unauthorized disclosure for reasons of national security, or information derived therefrom, or any Restricted Data, as defined in section 11 y. of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).

TITLE II—DEPARTMENT OF JUSTICE DECISIONS NOT TO PROSECUTE BECAUSE OF POSSIBLE DISCLOSURE OF CLASSIFIED INFORMATION

GUIDELINES PRESCRIBED BY THE ATTORNEY GENERAL

SEC. 201. Within ninety days of the date of the enactment of this Act, the Attorney General shall issue guidelines specifying the factors to be used by the Department of Justice in deciding whether to prosecute a violation of Federal law in which there is a possibility that classified information will be disclosed. Such guidelines shall be promptly transmitted to the appropriate committees of the Congress.

PREPARATION OF FINDINGS WHEN DECISION NOT TO PROSECUTE IS MADE

SEC. 202. (a) Whenever the United States decides not to prosecute any individual for a violation of Federal law because there is a possibility that classified information will be revealed, an appropriate official of the Department of Justice shall prepare written findings detailing the reasons for the decision not to prosecute such individual. The findings shall be prepared within thirty days of the date on which the decision not to prosecute is made and shall include—

(1) the classified information which the United States believes might be disclosed;

(2) the purpose for which the information might be disclosed;

(3) the probability that the information would be disclosed in the event of a prosecution; and

(4) the possible consequences such disclosure would have on the national security.

(b) All findings under subsection (a) shall be promptly reported to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

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